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VOL. 97 (2d Series) December 1984 No. 3

FEDERAL COMMUNICATIONS COMMISSION REPORTS
(97 F.C.C. 2d)

Decisions, Reports, Public Notices, and Other Documents of the Federal Communications Commission of the United States

VOLUME 97 (2d Series)
Pages 997 to 1315

Reported by the Commission

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—*Attribution of Ownership Interests*
Docket No. 20521

FCC 84-115
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BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Corporate Ownership Reporting and Disclosure by Broadcast Licensees.	Docket No. 20521
Amendment of Sections 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations.	Docket No. 20548
Amendment of Sections 73.35, 73.240, 73.636 and 76.501 of the Commission's Rules relating to Multiple Ownership of AM, FM, and Television Stations and CATV Systems.	BC Docket No. 78-239
Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities.	MM Docket No. 83-46 RM-3653 RM-3695 RM-4045

REPORT AND ORDER
(Proceedings Terminated)

Adopted: March 29, 1984; Released: April 30, 1984

BY THE COMMISSION: COMMISSIONER RIVERA ABSTAINING AND ISSUING A STATEMENT.

I. *Introduction*

1. The Commission has before it comments filed by numerous parties in response to its *Notice of Proposed Rule Making* in MM Docket No. 83–46 (*"Notice 83–46"*), FCC 83–46, released February 15, 1983, 48 Fed. Reg. 10082 (March 10, 1983), and comments and pleadings filed in related docketed proceedings and rule making petitions as captioned above.[1] This *Report and Order* concludes those proceedings, comprehensively reviewing and revising the standards for attributing interests in broadcast, cable television and newspaper properties insofar as application of the Commission's various multiple ownership rules is concerned and for reporting those interests to the Commission.[2] Briefly stated, the specific changes adopted herein include:

(1) Raising the basic ownership benchmark for attribution to 5%, regardless of the size of the licensee (eliminating the distinction between "closely-held" and "widely-held" licensees);

(2) Raising the attribution benchmark for "passive" investors to 10%;

(3) Introduction of a "multiplier" in determining attribution in vertical ownership chains;

(4) Clarification of the status of non-voting stock and limited partnership interests as non-attributable interests;

(5) Clarification of the attribution of interests held in various kinds of trusts and other fiduciary capacities;

(6) Provisions for the relief from attribution of officers and directors whose duties are not related to any licensee or its operations; and,

(7) Modifications of existing ownership reporting requirements to reduce their burden and to conform them to the new attribution rules.

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[1] A list of the parties filing comments in each of these proceedings is contained in Appendix B.* A general summary of those comments, all of which have been fully considered herein, is contained in Appendix A.

[2] It is important to reiterate at the outset that this *Report and Order* is not intended to affect in any respect the Commission's current multiple ownership rules themselves and does not prejudge any action regarding those rules which the Commission may consider; it simply determines how and to whom these rules should be applied. *Notice 83–46, supra* at n.4. Review of the Commission's "seven station" rule, which limits the number of stations a single entity may own nationwide, is the subject of another current rule making proceeding. *Notice of Proposed Rule Making* in Gen. Docket No. 83–1009, FCC 83–440, released October 20, 1983, 48 Fed. Reg. 49438 (October 25, 1983), corrected 48 Fed. Reg. 50907 (November 4, 1983). Review of the Commission's regional concentration of control restriction, which limits the proximity of any three stations owned by a single entity, is also the subject of another rule making proceeding. *Notice of Proposed Rule Making* in MM Docket No. 84–19, FCC 84–10, released January 17, 1984, 49 Fed. Reg. 2478 (January 20, 1984).

II. *Historical Background*

2. As pointed out in *Notice 83–46*, the attribution rules constitute "the mechanism by which the multiple ownership rules are given practical effect. That is, [they] define what constitutes a 'cognizable interest' for the purpose of applying the multiple ownership rules to specific situations." *Notice 83–46, supra* at para. 1. In that role, they represent the Commission's judgment regarding what ownership interest in or relation to a licensee will confer on its holder that degree of influence or control over the licensee and its facilities as should subject it to limitation by the multiple ownership rules.

3. The Commission's first efforts at limiting the multiple ownership of broadcast facilities consisted of local and national restrictions adopted in the early 1940's.[3] The current rule restricting ownership of broadcast entities on a national basis, the so-called "seven station" rule, was adopted in 1953. *Amendment of Multiple Ownership Rules* (Docket No. 8967), 18 FCC 288 (1953). In adopting this rule, the Commission stated that its fundamental purpose was "to promote diversification of ownership in order to maximize diversification of program and service viewpoints as well as to prevent undue concentration of economic power contrary to the public interest." *Id.* at 291–92. In this initial effort to achieve diversification of ownership, the Commission stated that it would make no distinction between a controlling interest and a non-controlling, minority interest for purposes of applying the rule, reasoning that minority shareholders can have considerable voice in the control and management of a corporate licensee. *Id.* at 292–93. It consequently determined that for a "widely-held" corporation (fifty or more stockholders), an interest constituting 1% or more of the outstanding voting stock would be cognizable, whereas for a "closely-held" corporation (less than fifty stockholders), any voting interest would be cognizable. *Id.* at 294.[4] It also

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[3] Duopoly and national multiple ownership restrictions were adopted for FM and television in 1940 [5 Fed. Reg. 2384 (June 26, 1940)] and 1941 [6 Fed. Reg. 2284 (May 6, 1941)], respectively. The first one-to-a-market rule was adopted in 1941 as part of the *Report on Chain Broadcasting*. After the Supreme Court upheld these rules of general applicability in *National Broadcasting Co., Inc. v. U.S.*, 319 U.S. 190 (1943), the Commission adopted a duopoly rule for AM. 8 Fed. Reg. 16065 (November 27, 1943). A national multiple ownership restriction for AM was first applied in *Sherwood R. Brunton et al. (KQW)*, 11 FCC 407 (1946), where the Commission denied an application for the transfer of an AM station to Columbia Broadcasting System, Inc., because Columbia already owned several other AM stations. The Commission thereafter proposed the adoption of formal rules limiting overall AM station ownership in 1948. *Notice of Proposed Rule Making* in Docket No. 8967, 13 Fed. Reg. 5060 (August 31, 1948).

[4] The "owns, operates or controls" language of the duopoly and one-to-a-market rules has been construed by the Commission to render these provisions applicable only where a stockholder holds a majority voting interest in the licensee or otherwise exercises actual control over the licensee. As to stock ownership, therefore, the percentage attribution

recognized the position of the officers and directors of a licensee corporation and brought them within the purview of the rule. *Id.* The Court of Appeals ratified this use of a stockholding percentage benchmark for attributing ownership, while observing that ownership interests of one percent do not necessarily constitute control. *Storer Broadcasting Co. v. U.S.*, 240 F.2d 55 (D.C. Cir. 1956).

4. The need for adjustments in this basic attribution rule became apparent in subsequent years. Widespread noncompliance with the rules by investment companies (mutual funds) was revealed in the course of a 1963 case involving an application for the transfer of control of a station.[5] The Commission initially granted the application, conditioned on the involved parties' "strict compliance" with the rule, but upon reconsideration, it agreed to suspend any divestiture requirement pending further investigation of the extent of such violations. *Baltimore Broadcasting Corporation and Metromedia, Inc.*, 1 RR 2d 798 (1963). The Commission promptly instituted a rule making proceeding to study the extent of noncompliance with the multiple ownership rules, anticipating a return to strict compliance within a "reasonable period of time." *Notice of Inquiry and Notice of Proposed Rule Making* in Docket No. 15627, FCC 64–861, September 16, 1964, 29 Fed. Reg. 13211 (September 23, 1964). Instead, after considering the data submitted regarding stock ownership in the broadcasting industry, the Commission decided to amend its attribution standard to permit investment companies to own up to 3% of a licensee corporation before an ownership interest in the licensee would be attributed to them for purposes of the national and regional multiple ownership rules. An eligible entity utilizing this higher attribution benchmark, however, was required to file a disclaimer of any intent to control or influence the licensee.[6] *Report and Order* in Docket No. 15627, 13 FCC 2d 357 (1968). In the same order the Commission determined to

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benchmarks advanced in connection with the national multiple ownership rules are not literally germane to these local rules. Recognition, however, of minority stock ownership interests, as well as non-ownership interests, in duopoly and "hybrid" one-to-a-market contexts came with the development of the Commission's "cross interest" policy. *See Minnesota Broadcasting Corp.*, 13 FCC 672 (1949) [duopoly]; *Lexington County Broadcasters, Inc.*, 42 FCC 2d 581 (Rev. Bd. 1973) [one-to-a-market]. *See also United Community Enterprises, Inc.*, 37 FCC 2d 953 (Rev. Bd. 1972) [evolution of the cross interest policy and its distinction from the multiple ownership rules]. Our action today does not affect the substantive aspects of this policy, which we shall continue to administer on a case-by-case basis. However, our decision herein will result in the application, as appropriate, of the duopoly and one-to-a-market rules themselves, in lieu of cross interest policy consideration, where voting ownership interests at or above the relevant benchmarks are involved. *See* para. 76, *infra*.

[5] *Baltimore Broadcasting Corporation and Metromedia, Inc.*, 1 RR 2d 795 (1963).

[6] The Commission rejected a proposal to use a 10% standard for investment companies, finding a 3% benchmark sufficient to minimize divestiture.

attribute stock held by stockbrokers and bank nominees to the individuals for whose benefit the stock was held, rather than to the nominal holders, thereby effectively eliminating any limit on the stock such a nominee could hold in that capacity. No similar provision was made for bank trustees as the Commission believed that those trustees usually held the power to vote the stock they held. The Commission subsequently further amended its rules to permit bank trustees to hold up to five percent of a corporation before an ownership interest would be attributed to them, reasoning that such holdings were "passive" in nature, with no intent to control the licensee. Again, it required that a specific disclaimer of intent to control be filed by any party wishing to avail itself of this standard.[7] *Report and Order* in Docket No. 18751, 34 FCC 2d 889 (1972). Subsequently, in an effort to equalize treatment of apparently similar entities, the 5% benchmark provision was extended to investment companies and insurance companies. So extended, this "passive" investor attribution standard was also applied to the Commission's cable television ownership limitations. *Report and Order* in Docket No. 20520, 59 FCC 2d 970 (1976),[8] *recon. granted in part, Memorandum Opinion and Order* in Docket No. 20520, 65 FCC 2d 336 (1977), *aff'd sub nom. National Citizens Committee for Broadcasting v. F.C.C.*, 559 F.2d 187 (D.C. Cir. 1977).

5. The Commission next proposed adoption of a 10% across-the-board attribution benchmark for the duopoly, one-to-a-market and regional ownership rules, in conjunction with its consideration of a regional concentration of control restriction.[9] When it subsequently adopted the regional rule, it noted that the 10% proposal received little attention,[10] and sought further comment on that issue in a *Further Notice of Proposed Rule Making* in Docket No. 20548 ("*Notice 20548*"), 63 FCC 2d 832 (1977). That rule making remains outstanding and has been incorporated into the present proceeding. The Commission has also initiated proceedings to consider various modifications of the reporting requirements for ownership interests, *Notice of Proposed Rule Making* in Docket No. 20521 ("*Notice 20521*"), FCC 75–710, released June 23, 1975, 40 Fed. Reg. 26543 (June 24, 1975), and to consider the propriety of attributing ownership to holders of various non-voting interests, as well as to examine the use of various insulating mechanisms to avoid attribution. *Notice of Inquiry and Notice of Proposed Rule Making* in BC Docket No. 78–239 ("*Notice*

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[7] The Commission noted that a 5% standard would necessitate significantly less divestiture than a 3% standard. A proposal to use a 10% attribution standard for bank trustees was rejected.

[8] The Commission also eliminated the requirement that eligible passive investors file disclaimers of intent to influence or control.

[9] *Notice of Proposed Rule Making* in Docket No. 20548, 54 FCC 2d 331 (1975).

[10] *First Report and Order* in Docket No. 20548, 63 FCC 2d 824 (1977).

78-239"), 68 FCC 2d 1302 (1978). These proceedings also remain outstanding and have been incorporated into the present proceeding. Finally, several requests for further rule changes and a request for waiver are outstanding at this time and will also be resolved herein.[11]

III. *Discussion of the Issues*

A. *Attribution Benchmarks*

6. Selection of an appropriate stockholding level at which to attribute ownership of a corporate licensee's facilities to the individual stockholder is the most significant aspect of this review of the attribution rules. As we stated in *Notice 83-46*, the industry and the investment community have evolved dramatically since the rules first began developing in the 1940's, and they may now be unnecessarily restrictive. We observed that a relaxation of the benchmark might serve the public interest by increasing investment in the industry and by promoting the entry of new participants, particularly minorities, by increasing the availability of start-up capital to these entities. We noted the existence of numerous other ownership regulations of several federal agencies, including our own, and suggested that conformity among these rules and the consequent reduction of the reporting burden would be a desirable result. At the same time, however, we recognized that the underlying principles and concerns of our own rules may be unique and require distinct analysis and results. Comment was invited on all of the above concerns, including their legal, economic, social, and policy implications. Specific empirical data bearing on these matters was particularly requested. *Notice 83-46, supra* at para. 46. The Commission also questioned whether a distinction should continue to be made for attribution purposes between widely-held and closely-held corporations and, if so, whether this distinction should be redefined. *Id.* at para. 33.

7. In approaching the benchmark issue, we have looked to the guidance of other regulatory and statutory ownership provisions, the suggestions and arguments of the commenting parties and our own experience in evaluating the evolving state of today's telecommunications marketplace. Additionally, we have conducted a survey of Commission ownership files to determine, to the extent possible, the typical size and

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[11] The rule making requests are: RM-3653, filed April 21, 1980, by the First Manhattan Company, requesting a rule amendment to establish a 5% cognizable ownership benchmark for investment advisors; RM-3695, filed June 5, 1980, by the Investment Company Institute, requesting a rule amendment to increase the cognizable ownership benchmark to 10% for investment companies and investment advisors; and RM-4045, filed January 27, 1982, by the Centennial Fund, requesting a rule change to allow self-administered pension funds to utilize a 5% ownership benchmark. The Ford Foundation seeks a waiver to permit it to hold up to a 5% interest in both closely-held and widely-held corporate licensees without attribution consequences.

distribution of stockholdings among the Commission's licensees.[12] Information was compiled from the ownership files of most widely-held corporate licensees,[13] and from a sample of closely-held licensees.[14] The survey's data provides us a more deliberate means of evaluating appropriate attribution levels than the "intuitive balance" suggested by some commenters. We are fully aware, of course, that many factors besides the size of a stockholding contribute to the influence or control the stockholder can or does exercise. However, stockholding size does have a legitimate, if imprecise relationship to its holder's ability to exercise influence or control, and it represents a useful tool for making this determination. It is also important to recognize that the relationship itself between cognizable ownership and actual influence over programming is at best indirect. Therefore, in structuring attribution levels to reflect this inexact relationship, we are mindful of the need for balance between inhibiting legitimate business opportunities and promoting a "clash of divergent views."

(1) *Benchmark for Non-Passive Investors*

8. Comments were primarily directed to the choice of a benchmark for widely-held corporations, and many seemed confined to that consideration only for institutional investors. They variously supported benchmarks of 1%, 5%, 10%, and 20%, although some implicitly urged a 49.9% benchmark for some situations. Commenters universally approved this comprehensive review of all of the rules, and several strongly urged that the Commission take the opportunity to simplify its rules.

9. Parties urging the Commission to retain its current 1% benchmark cited the lack of any evidentiary support for a change. They argued that raising the benchmark would adversely affect the advancement of minority interests in broadcasting because of the inevitable increase in conglomerate ownership that such action would permit. Parties supporting a higher benchmark, on the other hand, argued that the current criterion was selected arbitrarily in the first place, and that an upward adjustment is warranted given the profound changes in the investment

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[12] Notice of the existence and availability of this study has been filed in the record of this proceeding.

[13] Widely-held licensees are those with fifty or more shareholders. Several ownership reports were being updated with recent entries and were not in the files when the survey was conducted; others were rejected for various reasons, including being outdated. Some filing parties were holding companies or subsidiaries, whose ownership information was not useful or was duplicative of that filed by other licensees in the same ownership chain. 172 ownership reports were included in the survey, out of approximately 200 widely-held licensees.

[14] There are approximately 5500 closely-held licensees. A sample of 375 ownership reports was randomly drawn from that universe. Relative to the size of the universe, this sample should provide an accurate profile of the stock ownership patterns of these licensees.

market and in the media marketplace since the existing standard was established. They concluded that raising the benchmark will advance the public interest by increasing the availability of resources to broadcasters which, in turn, should result in improved service.

10. Parties supporting 5%, 10%, and 20% each contend that the particular ownership level they support best identifies the level of stock ownership at which a shareholder will be able to affect the affairs of a licensee. Several parties also cite those rules and regulations of other federal agencies which use the same benchmark they advance as evidence of the appropriateness of their selection.

11. In establishing appropriate attribution levels for stock interests in corporate licensees, the Commission has historically taken a cautious approach. The underlying multiple ownership rules are premised on the principle that "a democratic society cannot function without the clash of divergent views." *Second Report and Order* in Docket 18110, 50 FCC 2d 1046, 1079 (1974), *recon. denied,* 53 FCC 2d 589 (1975), *remanded on other grounds, National Citizens Committee for Broadcasting v. F.C.C.,* 555 F.2d 938 (D.C. Cir. 1977), *aff'd,* 439 U.S. 775 (1978). *See also Associated Press v. U.S.,* 326 U.S. 1, 20 (1945). Indeed, this "idea of diversity of viewpoints from antagonistic sources is at the heart of the Commission's licensing responsibility." *Second Report and Order* in Docket 18110, *supra.* In this respect, "[t]he significance of ownership . . . lies in the fact that ownership carries with it the power to select, to edit, and to choose the methods, manner and emphasis of presentation, all of which are a critical aspect of the Commission's concern with the public interest." *Id.* at 1051. In light of the weight to be given these considerations, and in the absence of any empirical evidence to guide its deliberations, the Commission exercised its best judgment in attempting to attribute any stockholding interest which might impart even slight influence in a licensee. We now believe, however, that this approach may have been unnecessarily restrictive in frequently attributing ownership to inconsequential interests.

12. *Widely-Held Companies.* Two factors convince us that, under current market and industry conditions, a 1% stockholder is unlikely to be able to exert control or programming influence on the basis of that stockholding in virtually any widely-held broadcast corporation. First, in comprehensively reviewing our ownership report files, we find that among all broadcast corporations studied a 1% shareholder is one of more than twelve individual shareholders, on average, reported as holding 1% or greater interests. Moreover, in some corporations, there are actually tens of 1% or greater shareholders. In many corporations, there are also several institutional shareholders with larger holdings. The 1% shareholder is, obviously, the least of these shareholders, and his shareholding is

only marginally greater than that of the host of lesser shareholders in the corporation. Consequently, a shareholder with 1% of a corporation's stock is not in a preeminent position among stockholders and is unlikely to have much influence among them on the basis of his stockholding, or to measurably affect the outcome of elective or discretionary corporate decisions. Second, with the increasing dispersion of stock into smaller holdings, the growing sophistication of company management methods and needs, and the rising participation in the stockmarket of individuals without management sophistication, stockholders have increasingly ignored or failed to independently exercise their voting rights. In this environment, corporate management has emerged as an increasingly independent source of control in corporations. This heightened independence of management means that a significant amount of stock must reside in one place to influence the activities of the management of most large corporations.[15] These factors taken together suggest that the 1% benchmark is unnecessarily low for accomplishing the stated objectives of the multiple ownership rules under current or anticipated conditions.

13. Having concluded that the existing attribution benchmark can be safely raised, we must now determine what new standard should be selected in its place. Our objective in this undertaking is to establish a benchmark which avoids unnecessary and possibly costly regulatory intervention by minimizing the attribution of noninfluential interests, yet which also identifies with reliable accuracy those interests that convey to their holders a realistic potential to affect the programming decisions of licensees. Based upon our analysis of the record, we have concluded that a 5% benchmark represents the best choice in this regard.

14. Our stockholding survey reveals that, under current attribution, aggregation, and reporting methods, a 5% shareholder appears to be one of the largest two or three shareholders, on average, in a widely-held corporate licensee.[16] In only a few cases are there more than three such shareholders, and in several cases there is only one such shareholder. Furthermore, a 5% or greater holding is substantially larger than the holdings of the host of lesser stockholders. Such a position makes the great majority of 5% or greater shareholders the preeminent shareholders

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[15] Over the years, numerous scholarly treatises have chronicled the increasing occurrence of management control in large corporations as sizable family holdings dissipate and stock becomes more widely dispersed. *See, e.g.*, A.A. Berle, Jr., and G.C. Means, *The Modern Corporation and Private Property* (New York: MacMillan Co. 1932), revised ed., 1968; R.A. Gordon, *Business Leadership in the Large Corporation* (Berkeley: University of California Press, 1961); M.L. Mace, *Directors: Myth and Reality* (Boston: Harvard Business School Division of Research, 1971).

[16] Although NBC's ownership survey lacks the necessary information regarding the methods and parameters it used to permit our reliance on it, we note that it basically confirms our own findings. *See* Appendix A, n. 7.

in their respective companies, with enough votes to potentially affect the outcome of elective or discretionary decisions and to command the attention of management. In view of these facts, it appears that a 5% benchmark is likely to identify nearly all shareholders possessed of a realistic potential for influencing or controlling the licensee, with a minimum of surplus attribution. In a corporation with no holders of 5% or more of its stock (approximately one fifth of widely-held licensees), it is probable that a holding of less than 5%, even though the largest holding in the corporation, is neither sufficiently greater than other holdings to accord it a distinct position nor significant enough to overcome the entrenched position of corporate management, particularly with respect to the day-to-day business judgments of the licensee, such as programming decisions.

15. In contrast, the adoption of a benchmark higher than 5% may result in many substantial and influential interests being overlooked. For example, the average occurrence of 10% or greater shareholders, under current attribution methods, is less than one for each corporation, and approximately half of the Commission's widely-held licensees have no stockholder with that large an interest. For over half of these corporations, however, there are one or two stockholders with an individual holding between 5% and 9.9%, a holding much larger than that of any other single stockholder, whose interest would not be attributed.

16. Beyond the statistical data from our ownership survey, we have examined ownership benchmarks utilized in other regulatory frameworks with a view to their applicability to our attribution determination. Our review reveals strong support for a 5% standard. Specifically, we note that none of the guidelines studied more closely parallels in purpose our own concerns than the stockholding disclosure requirements of the Securities and Exchange Commission (S.E.C.).[17] These requirements provide for the collection and public availability of information on all entities holding 5% of the stock of large publicly-traded corporations. 15 U.S.C. § 78m(d). In considering the significance of these requirements, we are mindful that our multiple ownership rules protect unique First Amendment concerns not within the S.E.C.'s jurisdiction. However, despite the different missions of the agencies and their respective regulations, to the extent that specific aspects of their rules are directed to the same purpose, they can be productively compared. In this regard, while the S.E.C.'s requirements are expressly intended for the protection of the shareholders in each company and of participants in the stockmark-

[17] For a discussion of other benchmarks considered and our reasons for finding them less relevant than the S.E.C. reporting requirements, see *infra* at paras. 22-23.

et generally,[18] they are directed to identifying interests with the potential for significant influence or control - the same interests at which our attribution rules are directed. Perhaps most telling, Congress reduced the S.E.C. reporting level from 10% to 5% in 1970, on the premise that "[acquisitions of more than 5% of a company's stock] may lead to important changes in the management or business of the company. . . ." *H. Rep. No. 91-1655*, 91st Cong., 2d Sess. (December 2, 1970).[19]

17. Importantly, nearly every demonstrable benefit to be derived from amendment of the attribution rules is achievable in large measure with a 5% benchmark, without incurring the risks involved in setting the benchmark higher. A 5% benchmark will eliminate attribution for over 80% of currently attributed stock interests; whereas a 10% benchmark would relieve only an additional 10% of interests, while adding a significant risk of overlooking influential or controlling stockholders for many corporations. The reporting burden is correspondingly lightened by an increase to 5%, whereas an increase to 10% will not afford appreciable additional relief for those with the greatest burden because the largest corporate licensees must report 5% or greater stockholders to the S.E.C. anyway under its disclosure requirements. 15 U.S.C. § 78m(d). Moreover, we are adopting several modifications to the rules unrelated to the basic attribution benchmark that will further increase capital availability and ease the burden and restrictions of the rules, without jeopardizing their basic integrity.

18. *Closely-Held Companies.* We agree with the parties promoting the elimination of the current distinction between widely-held and closely-held corporations for attribution purposes. Although the dynamics of the management of the affairs of a company may differ according to the dispersion of its stock, commenters have persuasively argued that this is as likely to decrease the relative importance of a given block of stock as it is to increase its importance. The holder of a small percentage of voting stock in a small company can be just as powerless and uninfluential as one in a large company, and often will be more so due to the greater occurence of large shareholders. On the other hand, the mere size of the shareholder group and the usually personal nature of the relationships among the shareholders provides much more meaningful and frequent contact and reduces the anonymity of shareholders.

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[18] *See, e.g., Dan River, Inc. v. Unitex, Ltd.*, 624 F.2d 1216, 1225 (4th Cir. 1980); *Abbey v. Control Data Corp.*, 603 F.2d 724, 731-32 (8th Cir. 1979); *S.E.C v. Savoy Industries, Inc.*, 587 F.2d 1149, 1166 (D.C. Cir. 1978); *Great Western United Corp. v. Kidwell*, 577 F.2d 1256, 1276-77 (5th Cir. 1978).

[19] S.E.C. rules further require that every 5% holder report every additional 1% acquisition as a "significant change." 17 C.F.R. § 240.13d-2.

19. The ambivalence of these conjectures is resolved, however, by the ownership survey which indicates that a 5% benchmark seems the most appropriate for those corporations heretofore considered "closely-held." Approximately two fifths of small licensees are sole proprietorships or 50/50 partnerships, in which cases attribution to all parties is a straightforward matter. Another one third of small licensees have a single majority interest holder, where attribution to the minority stockholders, regardless of the size of their shareholdings, is inappropriate.[20] That leaves approximately one quarter of small licensees whose owners will be directly affected by the particular benchmark applied. In those companies with more than just a few stockholders, of which one or two have clearly dominant holdings, the average size of the lesser holdings is well under 5% and most shareholders will thus be relieved of attribution by a 5% benchmark. This is appropriate because the dominant shareholders are most likely to control the affairs of the corporation. In those companies with no clearly dominant holding, a larger number of shareholders are on a relatively more equal basis, and most of the largest holders, with relatively equal power, will have an interest attributed. However, when the distribution of shares becomes so wide that interests are less than 5%, no interests would be cognizable, as would be appropriate given the lack of power any single shareholder possesses. Moreover, in each of these cases, those parties who wield particular influence are reasonably certain to appear as officers and directors and to have an interest attributed on that basis. Thus, these rules will serve to eliminate attribution for most noncontrolling and uninfluential stock interests, by absolving all holdings less than 5% and most of those holdings greater than 5% which are meaningless in terms of influence or control because of the dominance of other shareholders. At the same time, few significant shareholders are likely to escape attribution.

20. This rule change will have the additional benefit of significantly simplifying the rules and eliminating any discriminatory effect the existing distinction between widely and closely-held corporations may have occasioned. It could also significantly enhance the financial alternatives available to many of those small operations which traditionally have had the most difficulty obtaining financing, without diluting the underlying multiple-ownership restrictions which may be in effect.

21. *Companies with Single Majority Stockholders.* In those instances where a corporate licensee, whether closely or widely-held, has a single majority voting stockholder, it appears neither necessary nor appropriate to attribute an interest to any other stockholder in the corporation. In these circumstances, the minority interest holders, even acting collaboratively, would be unable to direct the affairs or activities of

[20] *See* para. 21, *infra.*

the licensee on the basis of their shareholdings. These interests, therefore, will not be deemed cognizable for purposes of our multiple ownership rules.[21] However, officers and directors of such licensee corporations will continue to have an attributable interest.

22. *Other Benchmark Options.* Several other federal agencies use various ownership percentage benchmarks, as set by Congress or the respective agencies, in their regulations. As we have noted, however, none of these benchmarks is so clearly directed as the S.E.C.'s reporting requirements to defining the same kind of ownership position involved in this Commission's multiple ownership rules. The benchmark most frequently cited as relevant guidance in amending our attribution rules is that restricting alien ownership of broadcast facilities.[22] The alien ownership restriction, however, is unique in several respects. In its aim, it is primarily and uniquely fashioned to curb alien activities against the United States in time of war.[23] Since an alien shareholder would presumably face the united opposition of native shareholders in such circumstances, it was not unreasonable for Congress to establish a relatively high stockholding level at which further alien stock ownership would be prohibited. The alien ownership provision also differs significantly from our multiple ownership rules in its scope and effect. It absolutely prohibits direct ownership of any single broadcast facility by aliens, it refers to total, as opposed to individual, alien ownership interests in any one facility, and it applies equally to all financial interests in all business forms of licensees. The multiple ownership rules, on the other hand, are directed to the possible cumulative effects of interests in several stations, and only restrict ownership in more than a given number of stations. Consequently, they refer to any single individual's (or entity's) specific interests and are directed primarily to voting and management interests. Moreover, the 20% standard has not been considered a conclusive presumption regarding the existence of alien control.[24]

23. Various other federal statutes and regulations containing ownership benchmarks appear equally inapt as guidelines. For example, the "insider" restriction of the Securities and Exchange Act,[25] is concerned with an individual's access to inside information which can be used to manipulate a corporation's stock on the exchange for the personal gain of

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[21] This exception plainly rests on the assumption that a simple majority vote is sufficient to affirmatively direct the affairs of a corporate licensee.

[22] 47 U.S.C. § 310. Among other things, this provision prohibits direct alien ownership of more than 20% of the stock of a broadcast licensee corporation.

[23] *See Noe v. F.C.C.*, 260 F.2d 769 (D.C. Cir. 1958); *Hearings on S.2910*, 73d Cong., 2d Sess. at 170-171. *See also* Watkins, *Alien Ownership and the Communications Act*, 33 Fed. Comm. L.J. 1 (1981).

[24] *See Glaser & Fletcher*, FCC 75-312, March 13, 1975, 33 RR 2d 37, 38 (1975).

[25] 15 U.S.C. § 78p.

that individual. The regulations of the Federal Aviation Administration and the Civil Aeronautics Board, as well as other agencies regulating specific industries, are generally limited to precluding collusive or anticompetitive economic behavior, while our rules also encompass a fundamental concern with diversity of viewpoints.[26] The unifying characteristic of these rules is that they are intended to prevent intrinsically illegal or undesirable activities. The levels of stock ownership which these rules variously identify as carrying an appreciable risk of permitting such activities seem inappropriate models where, as here, the activity at issue – influencing a licensee's programming decisions – is not only legal but expected behavior by one with a legitimate investment interest in the licensee corporation.

24. Finally, the Commission will not return to the use of *ad hoc* determinations for attributing the ownership of facilities, as suggested in *Notice 83-46, supra* at para. 23. Such a procedure would be virtually impossible to administer, if only for the sheer volume of determinations that would have to be made. For reports required on a regular basis, the same determinations would have to be made repeatedly due to slightly changing circumstances from one report to the next. If reports were not required regularly, the Commission would be entirely dependent on the haphazard notification that would result only when it occurred to an outside party that certain multiple interests might violate the rules and that the Commission should be advised. Furthermore, such a procedure would inevitably lead to unpredictable and inconsistent results, even if specific criteria such as those advanced in *Notice 83-46* were employed,[27] with the significant adverse consequences for licensees cited by the commenting parties. Even under the existing, specific attribution criteria, the Commission is called on to make innumerable individual judgments in the context of waiver requests and situations not contemplated by the rules. The rules adopted herein are intended to be sufficiently definitive to eliminate the need for most such individual determinations, lending consistency and predictability to the results.

25. *Rebuttability of the Benchmark.* While a definite benchmark will therefore be employed to establish cognizable interests, the presumption it establishes will be rebuttable in extreme cases. If an ownership interest is above the benchmark, the holder can attempt to show that the interest should not be cognizable. Such a stockholder will have a heavy burden of

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[26] The C.A.B.'s regulations, for instance, are designed, in part, to prevent collusive fare structures, and presume a holder of 10% of a carrier's stock may be able to engage in such activities. 49 U.S.C. § 1378(f). It is notable that, for all acquisitions, C.A.B. requires the reporting of all 5% or greater interests for its consideration.

[27] *Notice 83-46* included proposed criteria that could be used for determining whether interests below the benchmark should be attributed, in the event a relatively high benchmark were adopted. *Notice 83-46, supra* at paras. 23-24.

proof. The primary factor in such a showing would be a demonstration that another person (or persons) is in indisputable control of the licensee.[28] Important elements of such a demonstration would include the size of the stockholding of the alleged controlling party and how that stockholding compares to the others in the corporation, the nature of active participation in the corporation by that person, and concrete examples of his ability to consistently control the activities of the licensee.[29] These provisions should provide relief in those cases which most clearly warrant exception from the rules, without jeopardizing the integrity of the rules or the order they will provide, as some commenters fear.

26. *Additional Considerations.* We are cognizant of the fact that there are many more broadcast and other media outlets operating today than when the current attribution rules were adopted. The Commission has responded to this change by investigating the need to amend our multiple ownership rules to reflect the apparent increase in inherent diversity represented by this growth and has proposed appropriate changes in those rules.[30] The substantial growth in media voices alone, however, while relevant to our attribution decision, is not of primary significance. As we noted earlier, the attribution rules are the mechanical process of determining what constitutes an interest sufficient to affect the operations of the licensee. This determination is distinct from the determination of the number of outlets one party should operate to achieve the optimum level of diversity and competition.

27. While several parties argue that these marketplace changes result in more competition for broadcasting capital, there has been no evidence presented in this proceeding to indicate that the availability of capital generally has not increased along with the demands upon it. In any event, we are convinced that the substantial relaxation of the attribution standards effected by our decision here should be more than adequate to remove any constraint which these rules impose on capital sources. We note, moreover, that any easing of the multiple ownership restrictions themselves, now under consideration by the Commission, will profoundly affect investor activity and the availability of capital for all broadcasters.

28. While there have been general claims that the current rules present a serious impediment to the entrance of new broadcasters and thereby actually reduce diversity, those concerns should and will be addressed to the extent they are not simply overstated and undersupport-

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[28] Modifications in the rules adopted herein remove the need for such a showing by even substantial minority shareholders if there is a single majority shareholder in the corporation. *See* para. 21, *supra.*

[29] While the Commission will consider requiring a pledge of noninvolvement in any case for which an exception is granted pursuant to such a demonstration, the offer of such a pledge will not itself be dispositive.

[30] *See* n.2, *supra.*

ed. Specifically, several provisions are outlined below which significantly enhance the ability of new and small broadcasters to employ their primary sources of capital without undermining the integrity of the rules or the premises upon which they are based.

29. *Conclusion.* We are convinced that the 5% attribution benchmark we are adopting today, together with the other modifications adopted herein, should increase potential capital availability to broadcasters, even beyond the extent to which any need has been demonstrated by commenters.[31] It will also render the rules more realistic and effective, reduce the reporting and compliance burden where feasible, and avoid unnecessary government intrusion where possible, all while maintaining the essential integrity of the underlying multiple ownership rules.

(2) *"Passive" Investors*

30. In *Notice 83-46*, the Commission also sought comment on whether there are any legal or policy reasons for maintaining the distinction and separate benchmark for "passive" investors such as bank trust departments, insurance companies, and mutual funds. The evolution of this distinction is outlined in paragraph 4, *supra.*

31. Several parties urge retention of the separate classification and benchmark for "passive" institutional investors, and propose various modifications of that classification to include additional institutions. In this regard, they reiterate the Commission's own rationale that such institutions invest for income only, are so bound by fiduciary responsibility, and are either prohibited by law or simply not in the practice of taking control or influencing the programming decisions of the companies in which they invest. Opposing parties argue that the distinction is unrealistic, as a given ownership position confers the same status, whether to an individual or an institution. Others add that a general raising of the benchmark eliminates the need for continuing the distinction.

32. The Commission has already recognized the somewhat different position of certain "passive" institutional investors as compared to other investors, and has determined that such status warrants separate consideration and treatment within our attribution rules. We have said in the past: "With rare exceptions, the banks are passive investors who manage the trusts for investment purposes for the beneficiaries and not

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[31] One party submitted a study comparing the debt/equity ratios and retained earnings of selected Canadian and U.S. broadcast companies. While this information intends to suggest that the current 1% benchmark may be restricting capital, it is not sufficiently reliable to justify a dramatic change in the rules. In this regard, we note the profound differences in the size and fundamental nature of the two countries' industries and the conglomerate nature of several of the sample corporations. Moreover, information supplied by other parties concerning recent revenue levels and stock prices, while also not conclusive, indicates a generally healthy state for the industry.

to control the management or policies of a broadcast company;"[32] that "institutional investors [insurance companies, investment companies, bank trust departments] play passive investment roles;"[33] and that the benefits this exception will provide by "strengthening the economic foundation of the broadcasting and cable industries" outweighs the concern over the influence exerted by the voting and trading of the larger blocks of stock which the exception permits.[34] In our previous consideration of this subject we further found that "commenting parties have offered no actual cases of institutional investors using their minority interest in widely-held cable or broadcast companies to exert influence on the management of such companies."[35]

33. These reasons pertain no less today. Commenters have advanced no evidence, and we are aware of none, which would contradict the appropriateness of the passive status we have traditionally accorded to investment companies, bank trust departments and insurance companies. Moreover, based on our experience with the existing 5% benchmark and the comments of numerous parties to this proceeding, it appears that the benchmark for these "passive" institutional investors can be safely raised to 10%. This action should substantially increase the investment flexibility of these entities and, in so doing, expand the availability of capital to the broadcast and cable industries without significant risk of attribution errors. We do not believe, however, that an increase in the passive benchmark above 10% is similarly advisable. We have previously observed that merely voting or trading large blocks of stock can affect the management of a company,[36] and the S.E.C. has reached a similar conclusion.[37] Based on our stock distribution survey, it appears that a block of 10% or more of voting stock approximates the shareholding level in most broadcast corporations that could often result in this effect, even if inadvertent and unintended.

34. The application of this benchmark presumes, of course, that the party using it maintains a truly passive role in the affairs of the licensee. This would include refraining from contact or communication with the licensee on any matters pertaining to the operation of its stations and no representation on the board or among officers of the licensee corporation

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[32] *Report and Order* in Docket No. 18751, *supra* at 892.

[33] *Report and Order* in Docket No. 20520, *supra* at 975; *Report and Order* in Docket No. 15627, *supra* at 369; *Report and Order* in Docket No. 20520, *supra*.

[34] *Id.*

[35] *Id.*

[36] *Report and Order* in Docket No. 15627, *supra* at 369; *Report and Order* in Docket No. 20520, *supra*.

[37] *Report and Order* in Docket No. 20520, *supra*; Securities and Exchange Release No. 14692, *On Beneficial Ownership Reporting Requirements: Report of S.E.C. to Senate Committee on Banking, Housing, and Urban Affairs*, July 1980, at n.87.

by persons professionally or otherwise associated with the institution. As a safeguard in this respect, each licensee will be required to certify that no such party has exerted or attempted to exert any influence or control over any of the affairs of the licensee. With inclusion of this certification provision, we find it unnecessary to require disclaimers of control by passive investors themselves, as has been required in the past.

35. While similar institutions should be treated similarly, several commenters correctly point out that all institutional investors do not operate in the same manner and that each should be accorded attribution status based on its specific function and nature. We agree. Accordingly, we will here consider individually each of the types of institutions which have been specifically proposed for inclusion as passive investors in this proceeding.[38] In doing so, by identifying qualifying and disqualifying characteristics, we will provide relevant guidance for future cases which may arise. Under the instant circumstances, we find this approach preferable to adopting criteria in a vacuum, the implications of which might not be apparent.

36. In RM-3653, First Manhattan Company requests that "investment advisors"[39] be accorded the same treatment as other passive investors since they resemble them in many respects and in some respects might be considered even more passive. In this connection, First Manhattan points out that investment advisors are generally divorced from the power to vote stock or to direct its disposition. In RM-3695, Investment Company Institute makes the same request, and proposes a 10% benchmark.[40] In those instances where an investment advisor does not have the power to vote the stock it holds or to direct its disposition, it should be and will be

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[38] The request for waiver by the Ford Foundation is moot in that it seeks 5% benchmark status, which will now be universally applied as a result of our action today. In its petition, Ford admits that it takes a somewhat active role in promoting certain social policies, both through its use of proxies and through direct contact with the management of the companies in its portfolio. Given this activity, it cannot be considered passive and should be and will be attributed with ownership at the 5% stockholding level. In any event, Ford indicates that its problems with the multiple ownership rules resulted from cross-directorships, rather than because of its stockholdings. In this regard, we note that our actions herein concerning the insulation and nonattribution of directors and the use of a multiplier in certain situations may provide additional relief.

[39] An investment advisor is an entity or individual that advises others, for a fee, of the value of securities and the advisability of securities investments. 15 U.S.C. § 80b-2(a)(11). An investment advisor, commonly a "broker dealer" (15 U.S.C. § 78o), will often directly invest for its clients, using its own discretion within whatever guidelines the client may provide. In this respect, it differs from an investment company since the stocks that it purchases belong directly to its client (although they may be held custodially in the investment advisor's name), whereas an investment company purchases stock for itself and in turn sells stock in the investment company.

[40] RM-3695 also requests that investments companies be given a 10% benchmark. That issue has already been addressed. *See* para. 33, *supra*.

treated the same as any other custodial holder; that is, ownership will not be attributed to it even if its name is on the stock certificate. With this provision, there is no need to raise the benchmark further than the standard 5% for such entities. We are aware, however, that an investment advisor's services, under its contract, may include the voting of the stock it holds. Such stock will be subject to the standard 5% benchmark and attributed to the investment advisor as appropriate. While some justification may exist to warrant according investment advisors passive status, we are not fully confident, based on the record now before us, that we should do so at this time. In view of the substantial upward adjustment of the basic attribution benchmark accomplished by our action today and the ease with which investment advisors may avoid attribution by passing through voting rights to beneficial owners, we do not believe that declining to grant these entities passive status at this time will be prejudicial. To the extent necessary under the revised criteria, we will continue to consider waiver requests from investment advisors regarding the appropriate attribution of their voting interests.[41]

37. Centennial Fund, in its petition (RM-4045), seeks an extension of passive status to pension funds, arguing that such status was rejected in the *Report and Order* in Docket No. 20520, *supra*, only because of a lack of evidence and experience with these funds under the newly enacted Employee Retirement Income Security Act of 1974 ("ERISA"). It does acknowledge that pension funds are not entirely passive, but it contends that the same can be said for the recognized passive investors. Our own research, however, has disclosed testimony in a Senate hearing indicating the increasing extent to which pension funds particularly are managing their own investments and actively pursuing various social goals in their investment policies, consistent with their fiduciary responsibility under ERISA.[42] [43] There is no similar evidence regarding the activities of

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[41] We note that First Manhattan, an investment advisor, was granted exemption from the standard benchmark in *Stoner Broadcasting System, Inc.*, 74 FCC 2d 547 (1979). That ruling, which was limited to the particular stockholding and was prompted by a desire to avoid divestiture of stock already held, involved an amount of stock less than that permitted by the new standard benchmark, and specifically depended on First Manhattan's agreement not to vote the stock above the current 1% benchmark. Moreover, no further accumulation of stock was to be permitted, and no subsequent violation was to be permitted following any voluntary divestiture. Given these decisional factors, this case does not support a general characterization of investment advisors as passive entities for attribution purposes.

[42] *Pension Fund Investment Policies: Hearings before Subcommittee on Citizens and Shareholders Rights and Remedies of the Senate Committee on the Judiciary*, 95th Cong., 2d Sess. (November, 1978); *Beneficiary Participation in Private Pension Plans: Staff Report of the Subcommittee on Antitrust, Monopoly, and Business Rights of the Senate Committee on the Judiciary*, 96th Cong., 1st Sess. (1979).

currently recognized passive investors. Furthermore, one of the major problems encountered by pension funds as recounted by Centennial - investment in two or more portfolio companies with investments in broadcasters - will be relieved in most instances by the multiplier provision adopted herein. Accordingly, we decline to accord passive status to pension fund investors.[44]

38. We also will not accord passive status to Small Business Investment Companies (SBICs), Minority Enterprise Small Business Investment Companies (MESBICs) and other venture capitalists at this time. While we recognize the critical role these entities play in the establishment and expansion of new and small broadcast companies, and particularly the entry and support of minority owned enterprises, we are convinced that the actions we have taken herein should satisfy the investment flexibility needs of these companies without extension to them of passive status under our attribution rules.[45] Specifically, it appears that the investment restrictions they typically face can be relieved by our provisions for non-voting stock (including preferred stock and non-voting stock with convert-

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[43] For example, the Amalgamated Clothing and Textile Workers Union received support from several other labor unions in a campaign of "corporate isolation" in conjunction with its efforts to unionize J.P. Stevens. Manufacturers Hanover Trust Company was pressured into dropping two Stevens' officials from its Board of Directors to avoid the withdrawal of over $1 billion in union trust and pension funds. Two multi-million dollar union accounts were actually closed, and union pension fund organizations led groups in placing various labor-management issues on the 1979 Stevens' proxy for consideration by stockholders. This campaign by ACTWU was cited as a major factor in bringing about the settlement announced on October 17, 1980. "News for Investors," Volume VII, No. 10, November 1980, at 205.

[44] We are aware that we have previously permitted a pension fund to utilize the passive investor attribution benchmark on the grounds, *inter alia*, that it resembled a mutual fund. *College Retirement Equities Fund*, 35 FCC 2d 885 (1972); *Report and Order* in Docket No. 20520, *supra* at 979. This decision, however, was based on the facts of that particular case and did not reflect a judgment that pension funds generally should be deemed passive investors for attribution purposes. Indeed, in the Commission's subsequent reconsideration of its *Report and Order* in Docket No. 20520, it specifically rejected passive status for pension funds, stating that "we have not been shown any justification or need for an across-the-board rule." *Memorandum Opinion and Order* in Docket No. 20520, 65 FCC 2d 336, 339 (1977). In any event, our findings in this proceeding suggest that pension funds, as a class of investors, are not so consistently passive in nature as to warrant relaxed benchmark treatment under our attribution rules. Moreover, because of these findings and because no need for additional relief has been demonstrated, we will not extend the 10% benchmark now applicable to passive investors to the College Retirement Equities Fund ("CREF"). Our decision in this regard will not prejudice CREF since it is currently subject to a 5% benchmark and may continue to utilize that percentage criterion under the standard attribution benchmark.

[45] We note that, while generally prohibited from assuming control of the companies in which they invest, SBICs and MESBICs are authorized to exercise control over debtor companies for temporary periods under specified conditions. 13 C.F.R. § 107.901.

ible voting rights), for various kinds of convertible securities and paper, and for limited partnership interests, as well as the substantial upward adjustment of the basic benchmark itself. In light of these alternatives, we find no compelling reason to alter the 5% benchmark for these entities.[46]

39. Some commenters have pointed out the problems encountered under our attribution and multiple ownership rules by certain institutions which may acquire stock involuntarily on a temporary basis. To relieve the specific difficulties in this regard of which we are aware, insurance companies henceforth will be permitted to exceed the 10% standard for a period of not more than one year in cases where they acquire stock as a result of a recapitalization of a company in which they have invested. If divestiture of the interest exceeding the benchmark is not achieved within one year of the date of acquisition of the interest, it will be attributed to the company concerned unless specific waiver of the rules is granted before that time. Identical provisions shall be applied to bank trust departments which acquire such interests involuntarily, *e.g.*, in the execution of an estate.

40. Finally, we note that the Commission's primary focus in devising its attribution rules governing stock ownership in corporate licensees is to identify and account for those parties holding significant potential influence over these licensees by virtue of their shareholdings. In this endeavor, we have generally concentrated on those parties with the power to vote the stock concerned. Following this approach, we deem it appropriate to relieve from attribution any party, whether an institution or an individual, that holds stock in a custodial capacity and effectively passes through the right to vote that stock to the beneficial owner. This provision is particularly significant for brokerage houses, which commonly hold large amounts of stock in "street name" for other parties, and for investment advisors, that often buy stock in their own names on behalf of their clients. This clarification of our attribution rules, in conjunction with application of the multiplier to reduce the attribution of indirect interests in vertical ownership situations, should provide significant relief to many institutional investors without appreciable risk of attribution errors. We emphasize, however, that to the extent the power to vote the stock concerned is not effectively passed through, the multiple interests of custodial holders will continue to be aggregated for attribution purposes.

[46] Some commenters requested an exception to our rules to permit SBICs and MESBICs to own unlimited amounts of voting stock without attribution, arguing that their passive natures and worthy purposes warranted such exemption. For the reasons stated above concerning passive status for these investment entities, we do not consider this exception advisable.

B. *Use of a "Multiplier" in Vertical Ownership Situations.*

41. *Notice 83-46* also proposed multiplying successive interests in vertical ownership situations to determine the attributable status of a remote interest in the ultimate licensee. After reviewing the comments, we conclude that this use of a multiplier would more realistically reflect a party's attenuated interest in a licensee where there are intervening corporations, than does the present practice of fully attributing any interest above the benchmark through each intervening corporation. As an entity's interest becomes further removed from the actual licensee, there is participation by increasing numbers of intervening officers, directors and managers in any decision ultimately affecting the licensee. Even those interests which are effectively controlling through any one link in a vertical ownership chain will be diluted by these intervening layers of management. As a practical matter then, the actual involvement with the ultimate licensee of officers, directors and major stockholders of a corporation with a significant but remote interest in the licensee may be virtually nil where several intervening corporations exist. Multiplication of the interests is intended to account for this diminution of involvement in attributing ownership interests. We will, however, modify the "straight" multiplier as proposed in *Notice 83-46* in one significant respect. Where a link in the ownership chain represents a percentage interest exceeding 50%, that link will not be included in the successive multiplication used to determine the cognizable status of ownership interests in the vertical chain.[47] With this exception, then, any party's interest in a licensee which is held indirectly through a chain of companies will have the appropriate benchmark applied for determining attribution to the product of the percentage values of the successive stockholdings which lead to the licensee.[48]

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[47] This pass through provision reflects the line of *de jure* control. While indicia of *de facto* control similarly could be used to restrict the multiplier, that would require this Commission to judge on an *ad hoc* basis when to apply the multiplier. More importantly, shareholders would be at risk of violating the multiple ownership rules at any time an intermediate entity in which they held an investment was "deemed" to be in *de facto* control or attributed with a cognizable ownership interest by virtue of the multiplier's effect on a remote subsidiary which was "deemed" to be in *de facto* control of the licensee. Such action injects uncertainty, complexity and great administrative burden on applicants, licensees and the Commission alike, while rendering the multiplier of little practical use. Noting the underlying inexact relationship between program influence and ownership interests in the first instance, on balance we conclude that the remote possibilities of attenuated influence over station programming are outweighed by the benefits of a simple, certain and administratively useful mechanism to reflect this attenuation.

[48] For example, assume that stockholder A owns 10% of company X, which owns 20% of company Y, which owns 60% of company Z, which owns 15% of company L, a broadcast licensee. Under the modified multiplier approach, Y's interest in L would be 15% (the

42. We do not presume that the exercise of programming influence in these situations can be predicted with the mathematical exactitude this formula suggests.[49] However, it will provide a simple, workable and long overdue means of accounting for the real dilution of interest in these situations and thus end much inappropriate attribution which occurs under the present method. While perhaps imperfect, we do not believe that this approach entails a significant probability of attribution errors. To the extent, however, that such errors do occur, we are convinced that they will not be substantial, particularly in view of the relatively low basic benchmark we have adopted herein. On balance, we conclude that the benefits to be achieved by adopting a multiplier outweigh the limited risk involved.

C. *Other Attributable Interests.*

43. In 1978 the Commission instituted a rule making to consider the appropriate attribution of stock held in voting trusts and of various other non-voting interests in licensees. *Notice BC 78-239, supra.*[50] The stated reason for this action was to consider the argument that attribution of ownership to these non-voting interests would reflect the potential for influence that such interests carry and might serve to maximize diversification of ownership of broadcast and cable television interests. *Notice BC 78-239, supra* at 1303. The Commission specifically questioned whether trustees of voting trusts are sufficiently insulated from the beneficial owners to independently exercise voting rights and whether significant

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same as Z's interest because Y's interest in Z exceeds 50%), X's interest would be 3% (0.2 x 0.15), and A's interest would be 0.3% (0.1 x 0.2 x 0.15). Using the modified multiplier and the existing 1% benchmark, A's interest in L would not be cognizable, while under the current rules governing vertical attribution it would be. If both the new 5% benchmark and the modified multiplier are used, neither A nor X would have an attributable interest in L.

[49] This lack of "mathematical exactitude" constituted the singular basis for our earlier rejection of the multiplier concept in the *Report and Order* in Docket No. 15627, *supra.* The more thorough analysis undertaken herein leads to the contrary conclusion for the reasons stated.

[50] The impetus for such a review of Commission policy derives from our consideration of two assignment of license cases which posed questions as to the propriety of using a voting trust and non-voting stock to facilitate station transfers which would not be allowed under the multiple ownership rules if the respective stocks were held outright. In both cases the Commission noted that precedent was ambiguous, that the propriety of such devices was not clear, but that there were other public interest considerations favoring grant of the transfers pending the institution of a rule making. *Bonneville International Corp.*, FCC 77-832, released December 8, 1977, 43 RR 2d 863; *Evening Star Broadcasting Co.*, 68 FCC 2d 129 (1978), *reaff'd as mod. on other grounds*, 68 FCC 2d 158 (1978). Similar concerns were raised by the employment of trusts to avoid the proscriptions of the cross-ownership rules in *Rust Craft Broadcasting Co.*, FCC 77-829, released July 26, 1978, 43 RR 2d 947, and *Television Wisconsin, Inc.*, FCC 77-830, released July 26, 1978, 43 RR 2d 958.

influence resides with the power to dispose of the stock held in trust. It also sought information on the extent of such arrangements in broadcasting ownership provisions and the customary provisions they included. It further questioned whether a block of non-voting stock could carry influence if large enough, particularly when held in conjunction with some other business or familial relationship. With regard to both non-voting stock and voting trusts, the Commission sought comment on the likely effect that the attribution of such interests would have on minority ownership in broadcasting. At the same time the Commission asked whether an ownership interest should be attributed to other non-ownership interests such as lease-back arrangements and debt holdings. The question of whether these non-ownership interests should be reported had already been raised in *Notice 20521, supra.* In *Notice 83-46* the Commission stated its intent to include these issues in this comprehensive review, requesting any comments that would contemporize or further elucidate those already filed in response to *Notice BC 78-239, supra. Notice 83-46, supra* at para. 27.

44. It appears from the comments in response to the subject rule makings that most non-voting interests in licensees should not be considered cognizable for purposes of applying the multiple ownership rules.[51] Contrary to some assertions, there is little "risk of influence" pertaining to these interests. Yet, they comprise a variety of important, effective vehicles by which a substantial amount of capital can be made available to the industry without jeopardizing the efficacy of the underlying multiple ownership provisions. Judging from the comments submitted, one area in which many of these mechanisms are most useful is in facilitating increased participation by new entrants and small licensees, and particularly minorities.

(1) *Non-voting Stock*

45. As several parties suggest, non-voting stock by its specific nature precludes the means to influence or control the activities of the issuing corporation, and this relationship is knowingly and intentionally entered into by the corporation and by the stockholder. No party has proposed circumstances under which this stock could confer any appreciable power on its holder. Moreover, the availability of an unattributable non-voting stock investment mechanism provides significant benefits. This device, for example, appears to be an invaluable means by which existing and prospective licensees raise new capital without diluting their control over their companies. It can also contribute significantly to relieving the

[51] Bearing in mind the limited probity of the observation, we note that the attribution practices of other federal agencies studied unanimously accord non-cognizable status to non-voting interests.

dilemma faced by venture capital companies. Through non-voting stock, these companies can obtain the equity deemed necessary to compensate their risk, while avoiding any implication of the control prohibited by our rules and other federal regulation.[52] Such vehicles are thus particularly significant in promoting the diversity of ownership at which the multiple ownership rules are directed.[53] Accordingly, we will continue to consider non-voting stock interests to be non-cognizable for purposes of the multiple ownership rules.

46. Non-voting stock which is convertible to voting stock will also not be considered a cognizable interest. If the contingency upon which the conversion right rests is beyond the control of the stockholder, attribution is clearly not appropriate, as no power to control or influence is even arguable. However, even if the contingency is within the stockholder's power to effect and its exercise may be imminent, until the stockholder actually has the power to vote, he should not be able to exercise influence or control subject to our rules. A "threat" to convert stock in order to vote is an empty gesture if such conversion would put the stockholder in violation of the multiple ownership rules.[54] If such a conversion would not violate the rules, reliance upon it to exert influence does not contravene the purpose of the multiple ownership rules.

47. A reservation the Commission has expressed concerning non-voting stock with convertible voting rights is that it may have a depressing effect on the value of common voting stock if "dumped" on the market, and therefore might confer some power on its holder. *See, e.g., Evening Star Broadcasting Co., supra.* No demonstration of this possible phenomenon has been advanced in response to that case or the subsequent rule making proceedings, and we are prepared now to disregard that reservation. Additionally, a power to compel dividends or financial distribution attached to a non-voting interest has not been shown to confer the power to influence or control a licensee in a manner contemplated by the multiple ownership rules, and we will not consider the existence of such a power to change the noncognizable nature of a non-voting stockholding.

(2) *Other "Convertible" Interests*

48. This same logic applies to warrants, debentures, and other convertible interests, many of which can be bought and sold for value

[52] *See, e.g.,* n.45, *supra.*

[53] Despite the ability of two entrepreneurs cited by one party to finance their station acquisitions without surrendering equity to a financer, many parties are not in such a strong financial position. Those parties should not be denied the opportunity to enter the industry, even if they must begin operations in a demanding financial position.

[54] Our enforcement authority clearly extends to individuals whose actions precipitate a violation of our rules. *See* para. 77, *infra.*

without ever being converted to stock. Like non-voting stock, they represent another important vehicle for financing because they exist outside the concerns and constraints of the multiple ownership rules.[55] We see no reason to alter this status or withdraw the clear benefits it confers.

(3) *Debt and Lease-Back Agreements*

49. We will not consider debts or lease-back agreements to confer a cognizable interest in the holder. There is no direct influence or control which pertains to them, and any indirect influence or control, if it occurred, would be too irregular and involve too many other factors for the Commission to oversee. Although there is no explicit information before us, it seems probable that the inclusion of debt in our rules would create numerous rule violations and present extremely severe restrictions on capital sources for broadcasters large and small, particularly since the sources of debt financing are far fewer than for equity financing. Some sources of financing must obviously be available to broadcasters, and these sources seem by far the least likely to involve an interest with which the multiple ownership rules need be concerned.

(4) *Partnerships and Associations*

50. Traditionally, partnership interests have been attributed under our rules. With respect, at least, to all but limited partners, this appears both logical and consistent with our objectives since partners are characteristically endowed with the power and responsibility to collectively or singly conduct the affairs of the partnership.[56] Accordingly, we will continue to attribute these interests as we have in the past. Other proprietary and cooperative ownership arrangements will be considered on a case-by-case basis in view of their highly variable natures.

51. *Limited Partnership Interests.* Limited partnership interests, however, can be safely exempted from the effects and implications of the attribution rules. A typical limited partner is in a position similar to that of the holder of a debt or non-voting stock as far as involvement in the management of the company is concerned.[57] Such an interest, conferring no influence or control over the licensee, is thus not within the purview of the multiple ownership rules. Furthermore, the involvement of limited partners in certain enterprises provides another important source of

[55] One party is concerned with the potential rule violations it faces when it accepts stock pledges or warrants as security for a loan. There seems little likelihood, however, of loan defaults precipitating stock conversions sufficient to pose a problem under our attribution and multiple ownership rules. In any event, in those cases where conversion is desired, the resulting stock presumably has some value which should permit its sale if its retention would otherwise violate the rules.

[56] *See, e.g.*, Sections 7 and 9–10 of the Uniform Partnership Act. 6 U.L.A. § § 7, 9–10.

[57] The inability of a limited partner to affect the management of a partnership has already been recognized by the Commission. *Anax Broadcasting, Inc.*, 87 FCC 2d 483 (1981).

capital for the industry,[58] without inherently affecting the distribution or concentration of control within the industry.

52. While we are convinced that limited partnership interests should be accorded non-cognizable status, we are also concerned, in view of the variable nature of the law in this area at the state level, that some means be provided to verify appropriate insulation of the general partner from any possibility of control or influence by the limited partners. As a means to this end, and in order to provide a measure of predictability as well as guidance for prospective limited partners, we will look to the provisions of the Uniform Limited Partnership Act of 1976 as a standard.[59]. Limited partners of a limited partnership conforming in all significant respects to these provisions will be considered exempt from attribution upon certification by the licensee or applicant that the partnership so conforms. Limited partners taking their interest under a partnership agreement which differs in any material respect from these provisions will be accorded non-cognizable status only upon submission of the agreement to the Commission accompanied by an acceptable explanation of how it nonetheless satisfies our stated concerns. Any limited partner relieved of attribution by these provisions may not be involved in any material respect in the management or operation of the broadcast, cable television or newspaper entity concerned.

(5) *Trusts*

53. Voting trusts present a somewhat more complex problem. In many cases, trusts are established for personal and economic reasons unrelated to any Commission rule, such as estate planning and income for dependents. Such trusts should be facilitated to the extent possible. Also, despite some banks' experience to the contrary, voting trusts are occasionally established specifically to effect compliance with the Commission's rules for holdings which would violate the rules if held outright. They are often used to execute a multi-phase transaction or one involving both broadcast and nonbroadcast properties which will ultimately result in holdings consistent with the rules, but entail temporary violations of the rules.[60] At other times, a trust may be used to indefinitely avoid divestiture of a valuable investment, often in conjunction with a new transaction.

54. The Commission has recognized the effective insulation such arrangements can provide, while maintaining a concern about their

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[58] *See, e.g.*, "Limited Partnerships and Leveraged Buyouts," *Broadcasting*, November 14, 1983, p. 40.

[59] 6 U.L.A. § 101, *et seq.* We will be particularly interested in conformance with § § 107–804, designed to ensure the independence of the general partner.

[60] *See, e.g., Metropolitan Theatres Corp.*, 85 FCC 2d 1004 (1981), *Westinghouse Broadcasting Co., Inc.*, 84 FCC 2d 938, 48 RR 2d 1377 (1981).

potential for abuse, depending on the particular provisions of each trust.[61] We will continue to accept trusts as legitimate insulation devices, judging their acceptability for our purposes on a case-by-case basis. We take this opportunity to clarify the criteria by which we evaluate these agreements in order to provide guidance for future use.

55. Any person (or entity) holding or sharing the power to vote the assets of a trust will have those assets attributed to him. If those assets are above the benchmark adopted herein, that person will be deemed to have a cognizable interest in the licensee's facilities. This is a straightforward application of the multiple ownership rules which are directed to the influence or control which the power to vote stock confers. Additionally, a grantor or beneficiary (or any other third party) who holds the unrestricted power to replace a trustee or to revoke a trust will also have the assets of that trust attributed to him, unless such power is contingent upon some event beyond that person's control. Such an arrangement clearly permits the holder of the replacement or revocation initiative to substitute his judgment for that of the trustee on issues involving the subject licensee.[62]

56. Where the power to sell voting stock is retained solely by the beneficiary or grantor, there is a potential for abuse which the Commission has recognized in past cases[63] and which has been reinforced by several parties to this proceeding. Retention of such a power will therefore constitute a cognizable interest if the trust assets exceed the benchmark established herein.[64] However, if power to sell the stock is held by the trustee or shared with the trustee, then only the trustee will have the interest attributed, as the trustee's fiduciary responsibility and independence of action should prevent the beneficiary from using the ability to sell stock to directly influence or control a licensee. In any case, if the beneficiary or grantor of a trust is to avoid attribution of the stock, the trustee must be an independent person with no familial or business relationship with the beneficiary or grantor. Moreover, the trust instrument must clearly state that there will be no communications with the trustee regarding the management or operation of the subject facilities. Also, in order to ensure noninvolvement by the beneficiary or grantor, their entire holding in the licensee must be in trust to avoid attribution of the interest.[65]

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[61] *See* n.50, *supra.*

[62] *See, e.g., Farmville Broadcasting Co.*, 47 FCC 2d 463 (1974).

[63] *See, e.g., Television Wisconsin, Inc., supra.*

[64] The S.E.C. has also determined that the power to dispose of stocks, standing alone, gives its holder the ability to "change or influence control," in deciding to include that power in its disclosure regulations. Securities Exchange Act Release No. 14692; *On Beneficial Ownership Reporting Requirements: Report of S.E.C. to Senate Committee on Banking, Housing and Urban Affairs*, July, 1980, at n.87.

[65] *Television Wisconsin, Inc., supra.*

D. *Consideration of Officers and Directors.*

57. In *Notice 83-46* the Commission also stated its intention to explore the issue of attribution to officers and directors (and equivalent representatives of noncorporate entities). It specifically suggested that some prescribed insulating mechanism might be appropriate to relieve attribution to those officers and directors and other representatives of an entity with a cognizable interest in a licensee who individually have no meaningful relationship to the licensee or its operations. *Notice 83-46, supra* at para. 43.

58. After reviewing the comments addressing this issue, we continue to believe that a limited means of relieving certain corporate officers and directors of attribution consequences should be available. The scope of our intention in this regard is narrow, however, for we do not intend to permit officers or directors to disclaim their interests as a matter of course. The basic rationale for attributing interests to officers or directors of corporate licensees or those of the licensee's parent corporations remains valid. Generally, the potential influence over a licensee wielded by these individuals is significant and should be cognizable if the purposes of our multiple ownership rules are to be properly vindicated. We recognize, as various parties contend, that this approach may impose constraints on the availability to interested corporations of officers and directors with "media expertise" because it restricts the limited number of such individuals from serving in these capacities on behalf of multiple corporate licensees. It is, however, precisely the ability of an officer or director, particularly one with "media expertise," to influence multiple licensees that our ownership rules are intended to detect and limit, and properly so.[66]

59. On the other hand, we do find it appropriate to provide attribution relief for corporate officers or directors of multi-faceted parent corporations where these individuals' duties and responsibilities are neither directly nor indirectly related to the activities of any broadcast licensee in which their corporation has a cognizable interest.[67] By the premise of this exception, such officers or directors will not exercise authority or influence in areas that will affect the licensee or licensees involved, and we see no reason to attribute an interest to them "by association." Under this provision, eligible officers and directors will be accorded exemption from attribution upon submission by the licensee, in conjunction with its

[66] To the extent, of course, that these officers or directors are sufficiently removed from the ultimate licensee by intervening corporate entities, the multiplier provision adopted herein may afford them attribution relief. *See* paras. 41–42, *supra*.

[67] The officers and directors of licensees themselves may not utilize this provision, although they may continue to seek non-cognizable status, as in the past, by specific waiver request.

ownership report or in conjunction with a relevant application, of the individual's name, his full title, and a description of his duties and responsibilities, along with an explanation of why that person should not be attributed an interest. This should be an efficient way of handling the matter that will avoid the administrative burdens and delays that use of an individual waiver approach would entail. Moreover, these clear guidelines will permit companies to act with some certainty in this area. The simplicity of this process, however, should not be taken to connote a lack of concern on our part that licensees exercise care in ensuring the accuracy of their submissions. Statements not meeting the standards we have described will be rejected and the licensee will be expected to effect prompt compliance with our rules. This should discourage any inclination to claim this exception where it is not warranted.

E. *Reporting of Interests.*

60. All licensees are currently required[68] to name in their Ownership Reports (FCC Form 323) all officers and directors of the licensee, specifying their stock interest, citizenship, and dates of election, and all partners or stockholders (if more than fifty stockholders, only those with 1% or more of the outstanding stock) and their stock interests and citizenship. The Report also requires information on any other broadcast interest of the licensee and its principal parties (officers, directors, stockholders, partners), and any family relationships or business associations among the principals. Further, the Report requires a listing of all stock transactions since the previous Report, including date, amount paid, and the before and after stockholdings and votes of the transferor and transferee. These reports are required of licensees upon the grant of a construction permit, for each renewal application, and in conjunction with any transfer or assignment application. Additionally, widely-held licensees must file annually, while all other licensees are required to report, within 30 days, any change in their ownership information. A separate form is required for any other entity which directly or indirectly controls the licensee or which holds 25% of its stock.

61. An apparent flaw in this reporting system, recognized in *Notice 83-46, supra* at para. 36, is its inability to identify and properly attribute parties who hold interests in several separate accounts, each of which individually is below the reporting threshold, but which aggregately constitute a cognizable interest. This problem is exacerbated by the increasing occurrence of accounts held in "street name" by various custodial holders. The Commission sought comment on means to avoid this problem, as well as the frequency with which ownership reports should be required in the future, if at all, and whether the reporting

[68] 47 C.F.R. § 73.3615

requirements for cable should remain distinct. *Notice 83-46, supra* at paras. 35-36, 39.

62. Several other proposals regarding ownership reporting remain outstanding from *Notice 20521, supra.* Therein, the Commission also questioned the accuracy of its attribution methods insofar as the large amount of stock held in nominee, street name and custodial accounts was concerned. It addressed other specific problem areas with the reporting system as well, including the plethora of monthly reports on minor stock transactions generated by existing filing requirements and the differences in reporting requirements on various Commission forms.[69] The Commission proposed the use of annual reports for widely-held licensees, which practice was subsequently adopted on an "interim" basis,[70] and a change in the definition of "widely-held" to include corporations with over 500 shareholders (instead of 50), which was subsequently rejected.[71] It also proposed to adopt those parts of the Model Corporate Disclosure Regulations it considered appropriate for FCC purposes to resolve the long-standing problem of incomplete ownership information.[72] These proposals were directed only to reporting requirements for widely-held licensees, and included: (1) a change to reporting the top thirty holders of voting shares, as aggregated,[73] of each licensee, and all other holders with 1% or more, (2) a separate annual chart for each parent or controlling company or other company with 10% of a licensee's stock, and (3) the filing of "intercorporate charts" graphically demonstrating the relationships between these entities. A listing of the past and present business interests of officers directors and shareholders was included. Also proposed was the reporting of long-term debt of $1 million or more and short-term debt of $10,000 or more, as well as financing lease arrange-

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[69] The forms are: Application for Construction Permit for a Commercial Broadcast Station (Form 301), Application for Assignment of License (Form 314), Application for Transfer of Control of Corporation Holding Broadcast Station Construction Permit or License (Form 315), and Ownership Report (From 323).

[70] *First Report and Order* in Docket No. 20521, FCC 76-541, released June 16, 1976, 41 Fed. Reg. 25002.

[71] *Id.*

[72] The Model Corporate Disclosure Regulations ("MCDR") were drafted by an interagency task force (including an FCC representative) assembled to study ways in which the reporting requirements of various federal agencies could be simplified, standardized, and made more effective to provide more meaningful information with less of a burden on the reporting parties and the agencies collecting the information. The task force was assembled in June, 1974 and released a set of model regulations in January 1975. Those model regulations were the basis for many of the Commission's proposals in Docket No. 20521.

[73] This aggregation process would require that any custodial holder appearing among the licensee's top thirty shareholders also report the top ten beneficial owners in the licensee for whom it holds stock in its custodial capacity.

ments. These proposals remain outstanding.[74]

63. The reporting requirements and reporting forms must obviously be changed to correspond to the new attribution standards and methods adopted herein. Furthermore, the Commission's various forms requiring ownership information will be standardized, to the extent practical. There is information, however, which is relevant in some situations and not in others, and therefore need not be collected on a routine basis. Accordingly, the revised Ownership Report (FCC Form 323) will be used for annual filing as required by the new rules, and will also compose the core of the ownership information section of the applications for construction and acquisition of stations, with the additional information required in those cases reserved to those respective forms. The differences between the information required from and the reporting periods of widely-held and closely-held corporations will be eliminated, consistent with the elimination of that distinction in the rules themselves.

64. With the adoption of a 5% benchmark, the reporting of any smaller interests appears unnecessary.[75] Although some parties have claimed that the reporting of 1% interests is essential to the Commission's enforcement of its rules and provides generally useful information, those parties have made no such demonstration. As explained above, the Commission has carefully devised an attribution standard which should identify those parties with interests that should be subject to the multiple ownership restraints. In so doing, the Commission has leaned toward a relatively conservative standard to ensure that its coverage is fully complete. We can perceive no legitimate regulatory purpose to be served by the routine submission of information beyond the scope of this attribution benchmark, and we shall require none. In this connection, we have decided not to amend our reporting requirements in an attempt to better account for multiple sub-bench-mark interests held through separate accounts by a single entity or individual which, when aggregated, exceed the relevant attribution levels. Short of requiring reporting of essentially all ownership interests, no feasible, comprehensive means appear to exist to reliably remedy this "horizontal" aggregation problem. We are simply not persuaded that the enormous burdens inherent in a total reporting obligation are justified by the limited number of additional cognizable interests which would be identified by such a system. However, we will

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[74] In the interest of simplification and uniformity, the Commission refrained from action on these proposals pending outcome of the S.E.C.'s "beneficial ownership proceeding" (40 Fed. Reg. 4212). *First Report and Order* in Docket No. 20521, *supra*, n.69.

[75] We emphasize that our action herein with respect to ownership reporting requirements in no way affects the continued obligation of licensees to reasonably determine and certify compliance with the alien ownership restrictions of Section 310 of the Communications Act of 1934, as amended. 47 U.S.C. § 310. Such certification is now and will continue to be required in connection with the application process.

require licensees to report aggregable interests exceeding the benchmark standard where these interests are known to the licensee. Since licensees are likely to become aware of such interests if their holder undertakes to exert the influence they collectively confer, intentional attempts to anonymously affect licensees' programming judgments through "horizontal" holding schemes will often be revealed by this simple requirement.

65. In adopting this provision, we are rejecting the proposal to require the reporting of the top thirty shareholders of each licensee, and the top ten accounts of any custodial holding among those top thirty. Such a requirement would put a tremendous burden on all licensees and deluge the Commission with information for which it has no legitimate regulatory need. For the reasons detailed above, we have determined that a 5% benchmark will best identify those stockholdings which should be subject to the multiple ownership rules. The information collected under a "top 30/top 10" system would bear little resemblance to that, as it would include information on tens of stockholders for each licensee, and on thousands overall, who have no influence or control over any licensee. The regulatory function of this ownership information collection is limited to administering the multiple ownership rules, and the costly and tedious collection of vast amounts of data not related to that function cannot be justified, despite any uniformity with other agencies that would be achieved.[76]

66. We will also reject the proposals from *Notice 20521* regarding the reporting of past broadcast interests of a licensee's principals. The collection of information on these parties' past broadcast interests was proposed to conform with the Commission's "long form" transfer application, which elicits information regarding past broadcast activities with a view to discovering conduct relevant to the transfer determination, such as "trafficking" in facilities by the respondent.[77] To the extent that information regarding an applicant's past broadcasting interests remains relevant to an application for facilities,[78] it appears both more appropriate

[76] Most licensees would not otherwise be required to file such information for any other agency, so that any such requirement by this Commission would be an additional burden for them. In any case, only the FCC, Interstate Commerce Commission, Civil Aeronautics Board, Federal Power Commission (now the Federal Energy Regulatory Commission), and the Securities and Exchange Commission began formal rulemaking proceedings based to some extent upon the Model Corporate Disclosure Regulations. Only the I.C.C. adopted a report based on MCDR, which it abolished after three years.

[77] The Commission's rules formerly prohibited the resale of a broadcast facility within three years of its purchase. *Applications for Voluntary Assignments for Transfer Control* (Docket No. 13864), 32 FCC 689 (1962).

[78] The three year holding period requirement was eliminated in 1982. *Report and Order* in BC Docket No. 81-897, 52 RR 2d 1081 (1982).

and efficient to require its provision in the context of the application proceeding rather than in conjunction with the periodic ownership reports.

67. We will also reject the various proposals to require information regarding the other present business interests of the licensee's principals,[79] and the other primary business interests and activities of the licensee. The proposal was advanced pursuant to MCDR's purpose of acquiring all information about relationships and interests which could have some effect on a company's activities. However, there are no rules restricting such interests and there is no Commission action which would be taken based on such information, and no other valid reason to collect such information has been advanced.

68. The reporting of all current broadcast interests of officers, directors and shareholders (or partners) will continue. This is the essence of enforcement of the multiple ownership rules. However, the instructions will be changed to specify reporting only for shareholders, officers and directors with attributable interests. We will require the reporting of only their interests in other broadcast and cable facilities and newspaper entities which meet our attribution standards, except for interests within the geographic limits of the cross interest policy, all of which will be reportable.

69. In compliance with the new attribution standards we are adopting, the submission of ownership reports by "holding companies" will be modified in a few respects. This proceeding has demonstrated the significance of 5% and greater voting interests, and has also clarified that our primary interest is in the voting of these interests. Therefore, information regarding any company which holds a 5% or greater voting interest in a licensee must be filed on a separate ownership report by the licensee. Consistent with our interest in the control of this holding, the separate form need include only the directors, "executive" officers,[80] any other officers with a relationship or responsibility to the licensee, and only those shareholders whose interest is cognizable after application of the

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[79] In *Notice 20521* the Commission proposed to require information concerning the "broadcast-related" interests of all officers, directors and 1% or greater shareholders, and concerning all other business interests of "principal officers," directors and 3% or greater shareholders. "Broadcast-related" was not defined, but was described as including activities such as advertising representatives, recording companies, record promotion companies and programming and talent producers and suppliers.

[80] "Executive" officers are the president, vice president, secretary, and treasurer (or their equivalents) and any other officer whose authority includes voting the company's stock in the licensee or otherwise extends to the business of the licensee/subsidiary. These officers, as well as the directors, may be able to avail themselves of the disclaimer provisions, as explained above in paragraph 59.

"multiplier".[81] Information regarding other broadcast, cable and newspaper interests of all parties so reported will also be required.

70. The filing of intercorporate charts, showing the relationship between related corporations, will be required where appropriate. Many widely-held companies already follow this practice, and it has proved very useful in clarifying relationships in complex organizations. The relatively minor burden which this requirement imposes is, in our view, more than offset by the significant benefits which it produces for both the Commission and the licensee.

71. The various proposals regarding the filing of short-term and long-term debt instruments and sizable financing lease arrangements advanced in *Notice 20521* will also be rejected. Any such provision would elicit information about a wide range of debts and leases which have no trappings of influence, are not appropriate for attribution, and therefore do not warrant reporting. That limited class of debts and leases which does have such rights attached to it as might affect the operation of a station are currently required to be filed by Section 73.3613, and will continue to be so under that rule.[82] To the extent that any creditor does exercise influence or control over a licensee's activities through its debtholding or other contract, the licensee is required to report that company or person in response to Question 6 on the Ownership Report. We presume that a licensee will be inclined to do so in the interest of maintaining its discretion to act freely.

72. The balance sheet and income statement data proposed for collection in *Notice 20521* was relevant for some purposes at the time the notice was adopted, in that such information could have assisted the Commission's practice of independently analyzing a broadcast applicant's financial qualifications. However, since such financial analysis is no longer performed by the Commission,[83] any need for this information has now dissipated. Accordingly, such a provision will not be adopted.

73. There is no legitimate regulatory need for the reporting of income beneficiaries of trusts who hold no power over the trust. Such interests are not cognizable as they are of no significance to the enforcement of the multiple ownership rules. Our multiple ownership rules are not concerned with diversity of profit-sharing, and no such provision will be adopted. Only one network claims that the income beneficiary of a trust has some influence, if the trust is very large, but it does not support this statement with analysis or illustration. In any event, if a beneficiary of a trust does

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[81] If any such stockholder is yet another company, the same provisions will apply, requiring the reporting of its executive officers, directors, and cognizable shareholders.

[82] Section 73.3613 requires the filing of copies of any agreement affecting, directly or indirectly, the ownership or voting rights of a licensee's stock. 47 C.F.R. § 73.3613.

[83] *Financial Qualifications Standards*, 87 FCC 2d 200 (1981).

exert influence in any manner, directly or indirectly, the trust will not provide effective insulation and the interest will be attributed directly to the beneficiary.

74. With the exception of sole proprietorships and 50/50 ownership arrangements, licensees will be required to file ownership reports on an annual basis. This merely continues the practice for formerly "widely-held" licensees. We see no need for collecting this information on a more frequent basis. Our information collection comprises primarily a monitoring function, which experience has proven to be sufficiently served by a yearly review. Annual reporting may overlook some cognizable and possibly violative holdings which may occur for short periods of time. However, such short-lived holdings do not represent the influence or control over a station with which the multiple ownership rules are concerned. On the other hand, less frequent reporting would permit violations to persist and become established in a manner contrary to the purposes of the multiple ownership rules and obtain a position such that their elimination might adversely affect the licensee and the public, as well as the offending shareholder.

75. For those licensees whose ownership information changes infrequently, the additional burden of more frequent filing is very slight, and will be further reduced by a new provision that any such licensee can simply file a letter stating that the licensee has reviewed its last complete ownership report and that no changes have occurred in the intervening year. This small imposition, even considered cumulatively, is justified in our view by the cumulative benefit obtained for more active licensees under this provision. The date for filing the new ownership reports will be the anniversary date of the licensee's renewal application. If a licensee has multiple stations so situated that their renewal anniversaries do not coincide, the licensee may choose which anniversary to use for its first Report and shall continue to use that date thereafter. We shall continue to require that the report be based on information as of a date not more than 30 days prior to its filing.[84]

F. *Uniform Application of the Attribution Benchmarks.*

76. A separate issue emerging from *Notice 83-46* (and implicitly raised in *Notice 20548, supra*) is whether the new attribution rules should be universally applied. The attribution rules adopted herein will be applied to all of the Commission's multiple ownership rules. As has been explained, those rules are intended to promote diversity of broadcasting by ensuring diversity of ownership. They are designed to prevent any party from influencing the broadcasting practices of more than a predetermined number of outlets in various geographic configurations. The attribution

[84] 47 C.F.R. § 73.3615(a).

rules, in turn, are designed to measure what ownership interests will confer that amount of influence or control which must be limited. The determination that a certain stock interest or other position might confer such influence or control is equally valid regardless of the particular context of rule in which it is applied.[85] This power does not change according to the holder's incentive to use it, as some commenters imply.

G. *Enforcement of the Multiple Ownership Rules.*

77. In conjunction with this proceeding, several parties have urged the Commission to direct its future enforcement efforts against individual shareholders rather than against licensees. The Commission has long presumed the authority to order divestiture of stock to effect compliance with the multiple ownership rules, and has ordered individual stockholders to divest themselves of violative holdings on several occasions.[86] Sections 4(i) and 303(r) of the Act (47 U.S.C. § § 4(i), 303(r)) provide the Commission with the "authority reasonably ancillary to the effective performance of its responsibilities" thereunder,[87] and Section 312 specifically provides for the issuance of cease and desist orders to a "licensee, permitee, *or person involved* . . . " in a rule violation. 47 U.S.C. § 312(c) (emphasis added).[88] However, while our authority to seek compliance with our rules and policies extends to individual shareholders, we do not believe it advisable to generalize as to the circumstances in which the exercise of this authority would be appropriate. Rather, we shall make this determination in the context of specific facts, as relevant cases arise.

H. *Consolidation of the Multiple Ownership Rules.*

78. Finally, as an administrative matter, in conjunction with these modifications of the attribution sections of the multiple ownership rules, we will consolidate the multiple ownership rules themselves. These rules, which are currently contained in separate Sections 73.35, 73.240, and 73.636, primarily repeat the same provisions as they apply to each broadcast service. They can be readily consolidated without affecting the

[85] While we have not performed a separate analysis of the stockholding distribution among cable and newspaper companies, we are reasonably certain that it is not sufficiently different from that in broadcasting to justify the adoption of a distinct benchmark.

[86] *Value Line Special Situations Fund, Inc.*, FCC 72-656, released July 19, 1972, 24 RR 2d 972, *recon. den.* FCC 72-790, released September 7, 1972, 25 RR 2d 265; *College Retirement Equities Fund*, FCC 72-527, released June 14, 1972, 24 RR 2d 841; *Keystone Custodian Funds, Inc.*, FCC 72-526, released June 14, 1972, 24 RR 2d 842.

[87] *U.S. v. Southwestern Cable Co. et. al.*, 392 U.S. 157, 178 (1968).

[88] The forfeiture provisions of 503(b) of the Act (47 U.S.C. § 503) were amended in 1978 to similarly extend the Commission's forfeiture authority over "*any person* who is determined by the Commission . . .to have. . . [violated the Commission's rules]." (emphasis added) That section previously restricted the Commission's authority to "any licensee or permittee of a broadcast station." Pub. L. 95-234, approved February 21, 1978, 92 Stat. 33 § 2.

application or effects of the rules. While the multiple ownership rules themselves are not a subject of the instant rule making, this ministerial change is authorized pursuant to Section 553(b)(3)(A) of the Administrative Procedure Act. 5 U.S.C. § 553(b)(3)(A). This change in no way affects the substance or scope of the multiple ownership rules.

79. Pursuant to the requirements of Section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 603, a final regulatory flexibility analysis has been performed and is attached hereto as Appendix F.

Accordingly, IT IS ORDERED, That Parts 73 and 76 of the Commission's Rules and Regulations ARE AMENDED, effective June 6, 1984, as set forth in Appendices C, D and E.

IT IS FURTHER ORDERED, That FCC Forms, 301, 314, 315, 316, 323 and 325 WILL BE AMENDED by subsequent Commission action, in accordance with the provisions in this *Report and Order.*

IT IS FURTHER ORDERED, That all of the captioned proceedings included herein ARE TERMINATED.[89]

IT IS FURTHER ORDERED, That the Petitions for Rule Making filed by First Manhattan Company (RM-3635) and by Centennial Fund (RM-4045) ARE DISMISSED.

IT IS FURTHER ORDERED, That the Petition for Rule Making filed by Investment Company Institute (RM-3695), IS DENIED.

IT IS FURTHER ORDERED, That the Petition for Waiver filed by Ford Foundation IS DISMISSED.

IT IS FURTHER ORDERED, That the Secretary SHALL CAUSE this *Report and Order* to be printed in the FCC Reports.

Authority for the actions taken herein is contained in Sections 4(i), 5(d), and 303 of the Communications Act of 1934, as amended.

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[89] Several past Commission decisions have been conditioned on or made subject to the outcomes in various of the rule making proceedings concluded by this *Report and Order. See, e.g.*, n.50, *supra.* Affected parties are reminded that they are now obliged either to comply with the new rules and requirements announced herein or to seek further relief from the Commission, as appropriate. In certain cases, the rule changes implemented by our actions today may render prior conditions moot. For example, in *WHYN Corp.*, 47 RR 2d 663 (1980), the Commission permitted Affiliated Broadcasting, Inc., to acquire a station in the same market as a station owned by the Washington Post Company, despite the fact that Berkshire Hathaway, Inc. indirectly owned 8.4% of API and 10.7% of Post. The subject assignment was explicitly conditioned on the outcome of the proceeding in Docket No. 20548. While the specific proposals initially advanced in that proceeding have not been adopted, under the amended rules, Berkshire would not be attributed with Affiliated's stations because the majority of Affiliated's stock was controlled by a single trustee. (Berkshire's interest may also have been relieved by the multiplier effect, depending on the sizes of the intervening interests.)

For further information concerning this *Report and Order*, contact Bruce A. Romano, Mass Media Bureau, (202) 632-9356.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

*Appendix B-may be seen in FCC Dockets Branch.

Appendix A

1. The complete comments of all of the parties in all of the subject proceedings are summarized below. A list of the parties is attached in Appendix B.[1]

Establishing a Benchmark

2. Several parties maintain that the marketplace has changed dramatically since the multiple ownership rules were originally adopted, while the attribution guidelines have not changed. Many of those parties point out that there are now many more broadcast outlets as well as new "high tech" programming outlets (e.g., MDS, DBS, LPTV, expanded cable), resulting in an inherent diversity that did not exist when the rules were established. Cox/Multimedia asserts that these changes have been recognized by the Commission in other recent and proposed deregulatory actions, and that the rejection of multiple ownership restrictions for the new technologies further demonstrates its recognition that increased competition calls for less restrictive ownership regulations. Several parties claim that these changes also have increased the "costs" of restricting investment, in that the advent of new technologies has sharply increased the competition for communications investment capital, with the new technologies, being unrestricted, enjoying an unfair advantage in raising capital.

3. Citizens responds that no evidence has been offered to indicate that the new technologies have been diverting capital and that, to the contrary, the availability of capital is demonstrated by the number of applicants for those facilities. Geller contends that the effects of the new and unrestricted technologies on capital availability is germane to a consideration of the multiple ownership rules themselves, not to the development of an attribution standard designed to reflect influence and control.

4. Several parties point out additionally that when the rules were developed there existed less institutional investing, the primary purpose of which is return on capital investment rather than direct involvement in the affairs of the companies. They contend that with the current predominance of institutional investing, the availability of capital is limited by unnecessarily restrictive attribution rules. Capital Research specifically asserts that broad-

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[1] Comments were filed late on behalf of Allied Bank of Texas and of Great American Insurance Company and others. As Great American's comments represent the results of a lengthy economic study which could not have reasonably been concluded and analyzed in time for our filing deadline and which is relevant to several areas of our inquiry, they will be accepted. Allied's comments, on the other hand, are several months late with no such excuse. However, in the interest of best resolving these issues, Allied's remarks will be informally considered where they are particularly useful although Allied cannot be considered party to the proceeding.

The comments of Syndicated Communications, Inc., Citizens Communications Center, and American Council of Life Insurance in Docket No. 78-239 were each filed a few days late for various reasons. As the Commission and all parties have had ample time to consider them with no prejudice to their interests or the Commission's processes, they are accepted and considered herein.

cast investments readily become too much bother for an investment advisor to deal with. Licensees claim that restriction of capital is a particular problem for small companies, and that no other industry is so disadvantaged. These parties claim that a higher attribution benchmark may infuse the industry with new capital from these sources, which would promote the public interest.

5. Several parties contend that the multiple ownership rules' goal of diversity is not advanced by its application, and Gaylord contends that the Commission has suggested in other rulemakings that maximum diversification of views may not be automatically linked to maximum diversification of ownership.[2] These parties specifically contend that an increase in capital will increase diversity of ownership, programming, and media sources as money becomes available to entrepreneurs in exchange for equity. Great American contends that restriction of capital for new and small businesses is one of the most critical effects of a low benchmark. Other parties contend that the Commission's goal of enhancing minority ownership in particular would be advanced by the increased availability of capital that a higher benchmark would occasion.

6. Citizens counters that a low benchmark aids minorities and other new entrants by preventing monopolization by conglomerates, and that if the Commission is specifically interested in promoting minority ownership, it should adopt specific rules such as special waivers for SBICs and MESBICs and other secondary lenders. Citizens also contends that in *Notice of Proposed Rule Marking* in MM Docket No. 83-46 ("Notice 83-46"), FCC 83-46, released February 15, 1983, 48 Fed. Reg. 10082 (March 10, 1983), the Commission expressed its disenchantment with the present benchmark in purely economic terms, but that there is no evidence that needed capital is lacking in the broadcast and cable industries.[3] ATC also takes issue with the various parties' assertions concerning the depressing effects of the current benchmark on investment, averring that institutional investment in the cable industry increased by 50% in 1980 and another 50% in 1981, and by a cumulative 200% in the last three years.[4] Geller simply contends that no reason was given for proposing such a "drastic" shift in policy.

7. NAB advances the additional salutary effect a higher attribution standard would have in freeing licensee and Commission resources by reducing the ownership reporting burden. CapCities contends that simplification of the rules in general should be a corollary consideration in this proceeding. Bonneville, Gaylord, and Life flatly state that no harm would be done to competition and diversity by raising the benchmark, and CBS maintains that it would not affect the ownership patterns of most entities, and particularly of publicly-traded companies. NRBA stresses that those parties with the greatest interest in investing in the industry are current investors, who are restricted by the existing rules.

8. As for a more appropriate benchmark, several parties variously concede that no simple standard can be foolproof or rationally related to control, that whatever percentage is adopted will be arbitrary, and that the Commission must therefore exercise an "intuitive balance."

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[2] Gaylord refers to remarks in a unpublished report by personnel from the Commission's Office of Plans and Policy to the effect that policies to maximize diversity may impose such costs as to have marginal value. O.P.P. Report of October 1980 on Policies for Regulation of Direct Broadcast Satellites, at p. 81.

[3] Citizens refers to stories in various recent periodicals as indicative of the profitability and hence the desirability of broadcast and cable investments, including a prediction in the March 21, 1983, *Broadcasting* that broadcast revenues were expected to increase by 12% in 1983, despite the generally poor economy.

[4] ATC cites W.P. Becker/A.P. Becker, "Survey of Historical and Projected Debt funds for the Cable TV Industry" (May 1982).

Gaylord and Licensees point out that the propriety of any given standard varies with the corporate structure of a particular licensee company. CBS asserts, for instance, that the preeminent position of William Paley in that corporation is a function of his involvement in the founding and development of the company, rather than his 5.6% stock ownership.

9. Gaylord urges the Commission to seek a standard which will result in the attribution of ownership only to those with *de jure* and *de facto* control, with a mechanism to police such control. It contends that there has been no showing that those with less control have an interest in or are capable of any meaningful control or influence over economic or broadcasting policies of the professionals in charge of day-to-day management. ABC recommends adopting a standard which will identify interests just below *de facto* or *de jure* control but above the "potential for a modicum of influence." Spanish International urges a standard aimed at defining the minimum level at which control must be presumed. Licensees propose that the standard should approximate an ownership level that results in some control over programming but that will not be unreasonably conservative for the majority of cases. Tribune contends that the standard should reflect a realistic potential for control. CapCities urges a standard representing the level at which a party has a "significant voice in management" rather than mere "influence." NRBA contends that a focus on "influence" would open a Pandora's Box of elements unrelated to ownership to be considered for attribution.

10. ATC contends that the Commission's interest in diversity extends beyond economic consequences and requires a closer scrutiny of any interest above *de minimis*. NBC, Geller, and Citizens point out that the Commission has traditionally been concerned with influence as well as control,[5] and Citizens points out further that the Courts have recognized that influence can be an element of control, citing *Storer Broadcasting Co. v. United States*, 240 F. 2d 55 (D.C. Cir. 1955). Citizens also stresses that whatever benchmark is adopted, it will be impractical to attempt to reduce it at a later date, contending that the primary reason for the present exceptions for certain institutional investors was the Commission's desire to avoid divestiture of violative interests held at that time.[6]

11. Most of the commenting parties support a new attribution benchmark of 5%, 10% or 20%. Others argue for retention of the 1% benchmark generally or with respect to specific interests. Some of those supporting the higher benchmarks further propose separate benchmarks for different kinds of shareholders or forms of licensees.

12. Citizens calls for retention of the present 1% benchmark, contending that it limits not merely control of stations, but also the intangible influence which may be exerted by noncontrolling shareholders, citing *Storer Broadcasting Co. v. U.S., supra*. In contending that 1% should be retained for co-located broadcast and cable operations, due to the particular incentive to influence in such a situation, ATC asserts that a person with a 1% interest can indeed influence a company's activities if sufficiently motivated to do so. Similarly, LIN contends that the 1% benchmark should be retained for production and distribution companies' interests in broadcasters due to their incentive to control programming and the resultant restriction of a licensees' discretion if they are permitted an influential interest (of 1%). Citizens also contends that the current 1% benchmark aids minorities and other new entrants to the industry by preventing monopolization by conglomerates.

13. Cox/Multimedia contends that a shareholder with less than 5% of a company's outstanding voting stock is generally not routinely able to influence corporate policy in

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[5] NBC and Citizens point to the rules themselves, 47 C.F.R. § § 73.35(b)(1), 73.242(a)(2), and 73.636(a)(2).

[6] Citizens cites *Report and Order* in Docket No. 15627, 13 FCC 2d 357, 369-370 (1968), and *Report and Order* in Docket No. 18751, 34 FCC 2d 889 (1972).

general or programming decisions in particular. CBS claims that most major investors seldom hold more than 5% as a matter of investment strategy, and adds that a 5% attribution benchmark would reflect only a modest increase in non-attribution holdings for individuals and none for institutions. NBC and Taft assert that a 5% holding is a significant interest, and often the largest single holding in a company.[7] Geller asserts that the adoption of any higher standard would undermine the multiple-ownership and cross-interest policies and make evasion of the rules much easier. Several other parties express general support for a 5% attribution benchmark.

14. Numerous parties note that a 5% standard would parallel the Securities and Exchange Commission's standard set by Congress, which requires public disclosure of the acquisition of a "beneficial interest" of 5% or more of any class of voting stock of a publicly traded company.[8] Metromedia asserts that the Securities and Exchange Commission is the expert agency in the field of corporate security and that its statute and regulations are entitled to deference in the area. CBS, NAB, Geller and Cox/Multimedia add that the difference in the missions of the two Commissions need not preclude a correlation of requirements as there is a correlation in their concerns, *i.e.*, identifying parties with the potential for influence and control. Cox/Multimedia additionally points out that the Investment Companies Act of 1940 provides that a person holding 5% of an investment company is an "affiliated person" with whom transactions must be registered by the Securities and Exchange Commission,[9] and that the Bank Holding Company Act specifies the holding of 5% of voting stock as determinative of whether an entity has control of a bank.[10].

15. Citizens contends that it is inappropriate to link the Commission's multiple ownership rules and reporting requirements to the standards of another agency because of the unique First Amendment concerns relevant to telecommunications media. It contends that the SEC's standard is not applicable because it is aimed at protecting stockholders and investors, whereas Sections 303(r), 307, and 309 of the Communications Act[11] require protection of the public interest, including its interest in access to diverse ideas from antagonistic sources, citing *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969) and *N.B.C. v. U.S.*, 319 U.S. 190 (1943).

16. CapCities contends that the Securities and Exchange Commission standard is too low because it does not reflect the ability to have a "significant voice" in management. It is joined by several other parties in urging a 10% benchmark. Licensees contend that it is not reasonable to believe that a holder of anything less than 10% of outstanding voting stock has a "considerable voice" in the control or management of company.

17. Harte and Licensees assert that permitting a 10% level of ownership before making an interest cognizable does not threaten the multiple ownership rules because any takeover attempt by a holder of a smaller percentage of stock would be noticed by management

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[7] NBC states that its own examination of a "representative cross-section of thirty FCC annual ownership reports" reveals that in "mature" widely-held corporations, officers and directors seldom hold as much as 5% of the stock collectively, and that there are usually few or no individual holdings above 5%, except for institutions holding stock in custodial or fiduciary capacities. It further claimed that stock of those companies in which a single entity or group of persons (usually a family) still hold a significant block is inevitably becoming more widely distributed as a result of estate tax considerations and increasing dispersion among successive family generations.

[8] 15 U.S.C. § 78m(d).

[9] 15 U.S.C. § § 80a-2(a)(3), 80a-17.

[10] 12 U.S.C. § § 1841(a)(2), (a)(3).

[11] 47 U.S.C. § § 303(r), 307, 309.

anyway, and Commission rules would continue to require application and prior approval of any such transfer of control. Licensees point out that a 10% ownership level is recommended by two investment entities as the maximum practical ownership limit for reasons unrelated to this Commission's regulatory concerns. Therefore, it concludes, setting the benchmark above 10% would not be likely to produce significantly greater capital investment. Tribune and CapCities also contend that a 10% benchmark would provide adequate investment opportunities, with the proviso that it can be raised later if experience proves that appropriate. Cox/Multimedia further contends that a 10% shareholding level should also be adopted for the attribution of interests in closely-held corporations and for voting or managing partnership interests. Several other parties generally express their support for a 10% of ownership attribution standard.

18. CapCities states that 10% voting stock ownership is presumed to constitute control by the Federal Aviation Administration,[12] and that 10% stockholders are considered "insiders" by the Securities and Exchange Commission, regardless of whether they actually possess inside information.[13] In response to *Further Notice of Proposed Rule Making* in Docket No. 20548, 63 FCC 2d 832 (1977). Rust commented that a 10% benchmark "seems reasonable," and pointed out numerous federal statutes which use a 10% standard.[14]

19. Geller contends that since a 10% attribution benchmark was first proposed eight years ago in *Notice of Proposed Rule Making* in Docket No. 20548, 54 FCC 2d 331 (1975), (for local and regional multiple ownership rules) no support has been provided for that standard. ABC and Metromedia contended in response to the 10% proposal of *Further Notice 20548, supra*, that a 10% benchmark would be unnecessary and somewhat precipitous, whereas a 5% benchmark would be realistic and provide a beneficial impact on the degree of investment permitted while guarding against any undue concentration of media power.[15] NCCB contended that a 10% benchmark could not be adopted without a strong justification, which had not been presented.

20. Among the parties supporting raising the attribution benchmark to 20%, Centennial claims that any holder of a lesser interest would still be "passive" in all respects relevant to the multiple-ownership rules. It further argues, with Gaylord and GCD, that the alien ownership limitations[16] reflect a legislative determination that ownership of less than 20% of a broadcasting company's stock is not sufficient to result in control. Gaylord claims that this "Congressional guidance" relates to public interest concerns of greater significance than those represented by the multiple ownership rules, and that the capital availability considerations to temper the guideline are even less, and thus 20% would be a conservative benchmark. GCD stresses that 20% is the ownership level used in "equity accounting,"[17] and that Section 80a-2(a)(9) of the Investment Company Act of 1940 uses a 25% ownership standard for presuming control. Northwestern claims that the Commission has often found in transfer of control cases that interests well above 20% do not result in control. Cox/Multimedia asserts that the *Final Report of the Advisory Committee in Alternative*

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[12] 49 U.S.C. § 1378(f).

[13] 15 U.S.C. § 78p.

[14] Rust specified the Federal Aviation Act, the Federal Deposit Insurance Act, the Public Utilities Holding Company Act of 1935, the Investment Company Act of 1940, and the Communications Satellite Act.

[15] Both parties also recommended that a disclaimer be required from any noninstitutional investor holding over 1% of a licensee's voting stock.

[16] 47 U.S.C. § 310.

[17] According to GCD, generally accepted accounting principals permit "equity accounting" where an investing corporation owns 20% of another corporation.

Financing for Minority Opportunities in Telecommunications recommends that entities with 20% minority ownership be permitted tax certificates, as that level of ownership provides sufficient control to reflect the minority interest. Gaylord contends that a rise to 20% is not "revolutionary" in light of the Commission's recognition that new channels eliminate the need for multiple ownership rules for the new media.

21. NRBA claims that if 20% were adopted, sufficient information would still be available under strict reporting requirements to challenge specific cases in which control is suspected. Institute proposes that a 20% level be permitted with the filing of a disclaimer. Gaylord concludes that parties recommending a benchmark below 20% offer only subjective opinions that 5% or 10% would represent a more acceptable risk of influence.

22. NBC asserts that ownership of 20% of outstanding voting stock is far above the level conferring potential for control and anti-competitive influence. ATC adds that negative control is possible well below a 20% ownership level, and Harte expresses concern that such a high level might encourage takeovers.

23. Several parties contend that the alien ownership standard is not relevant to determining attribution of ownership for purposes of the multiple ownership rules. Spanish International claims that there is no legislative history available as to why 20% specifically was chosen. Other parties assert that in adopting the statute, Congress was primarily concerned with military and wartime ramifications of ownership.[18] They further contend that the statute differs in other respects, for instance, that it applies to all interests, not just voting interests, that it refers to total alien ownership, not the interests of the individual shareholders, and that the 20% standard is applied equally to all licensees, regardless of their business form. Citizens points out that the Commission has previously rejected arguments that the alien ownership limitation is an appropriate guide for the multiple ownership rules' attribution standard in *Report and Order* in Docket No. 15627, *supra* at 370. It further asserts that even the 20% standard provided by Congress has not been considered conclusive in determining control by aliens.[19] Geller contends that Congress has necessarily been aware of the variance between the multiple ownership rules' attribution standards and the alien ownership rules for thirty years and has taken no action indicative of any dissatisfaction with them.

"Closely-held" vs. "Widely-held"

24. Cox/Multimedia urges the Commission to retain its use of distinct benchmarks for widely-held and closely-held corporations. It contends that there are differences in function and operation between the two type of companies. It further supports retention of the "50 or more shareholders" guideline for distinguishing the companies. It stresses that this distinction has long been used by the Commission so that its operation and effect are familiar, and that there has been no indication of any significant inadequacy of this standard. Citizens and Geller assert that a stockholder in a small corporation does wield more influence than in a large corporation, as the rule is designed to recognize. Several parties' comments regarding appropriate shareholding levels for attribution of ownership and for reporting of interests are restricted to widely-held corporations, without addressing the propriety of continuing this distinction.

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[18] Spanish International asserts that the Navy Department was concerned with alien access to communications carriers, citing *Hearings on S.2910*, 73d Cong., 2d Sess. at 170-71. Licensees cite *Noe v. F.C.C.*, 260 F.2d 739 (D.C. Cir., 1958); *Data Transmission Co.*, 52 FCC 2d 439 (1975).

[19] Citizens refers to *Data Transmission Co.*, 59 FCC 2d 909 (1976), in which the Commission established a list of factors to be considered in case-by-case analysis of alien ownership questions.

25. Opposing parties assert that the distinction should be eliminated. They variously contend that there is no supporting rationale, that there is no legal or factual basis for the "50 or more shareholders" cut-off, and that the "dynamics of control" are not sufficiently different between closely- and widely-held corporations to support the distinction. ABC and Northwestern assert that the distinction makes no sense because a shareholder can hold such a small amount of stock that the number of other shareholders is irrelevant to the degree of influence or control he can exercise. Spanish International contends that the current distinction is applied backwards, *i.e.*, that the holder of a small interest in a closely-held corporation is likely to wield less influence or control than the holder of a similar interest in a widely-held corporation. It contends that the validity of the distinction has previously been questioned by the Commission in Dockets No. 8967 and 15627.[20]

Use of Ad Hoc Rulings and Rebuttability of the Benchmark

26. Virtually all parties oppose a return to *ad hoc* rulings without a set benchmark for ownership attribution, variously characterizing such a procedure as "impractical," "an administrative nightmare," and a waste of resources. They contend that *ad hoc* rulings would increase uncertainty and slow down the completion of business transactions indefinitely. Gaylord also fears that this approach might encourage the pressing of frivolous charges, and CapCities fears that it may cause corporate in-fighting between management and shareholders trying to demonstrate their respective control or lack thereof. Citizens and Geller contend that case-by-case analysis of multiple ownership questions has already proven unworkable, and was rejected by the Commission in its adoption of a fixed overlap standard for the duopoly rule in *Report and Order* in Docket No. 14711, 45 FCC 1476, 1479 (1964). Only Spanish International supports the use of *ad hoc* rulings, suggesting the application of Section 310(d) case law.

27. There is some divergence of opinion on the related issue of whether a set benchmark should constitute a conclusive or rebuttable determination of "ownership" subject to the Commission's restrictions. NRBA and Bonneville propose that the attribution benchmark be used as a rebuttable presumption of a shareholder's influence or control, contending that this approach would provide sufficient uniformity without inflexibility, and that it would be relatively easy to administer, with few individual cases likely to arise. Gaylord contends that any "flexibility" is more theoretical than real because a possible rebuttal cannot be relied on in business planning, and is offset by the need for certainty and stability.

28. CBS, Great American, and Northwestern believe that only the presumption of control for holdings above the benchmark should be rebuttable, and CapCities contends that it should not be. Northwestern and GCD believe that rebuttal should be allowed up to 50% ownership. Metromedia believes that rebuttal should be allowed only up to 10% ownership, and only for "passive" investors.

29. CapCities contends that only the presumption of non-control for holdings below the benchmark should be rebuttable, while CBS contends that it should not be, as that would lead to uncertainty and deter investment by major investors. Tribune counters that a rebuttable presumption in such a case still permits sufficient certainty and suggests that the Commission use the various indicia proposed in *Notice 83-46*. NRBA suggests that a party with an interest below the attribution level should be permitted to submit a disclaimer of intent to control in order to make the presumption of noncontrol conclusive.

"Passive" Investors

30. Several parties urge the Commission to retain its separate consideration and benchmark for "passive" institutional investors, and propose various modifications of that

[20] *Amendment of Multiple Ownership Rules* (Docket No. 8967), 18 FCC 288 (1953); *Report and Order 15627, supra.*

classification. Harte advances the inclusion of pension funds, and is joined by Metromedia in advancing the inclusion of SBICs and MESBICs. They claim that the latter inclusion will help to advance minority ownership in broadcasting, and assert that the Commission's previous adoption of other special rules for advancing minority ownership demonstrates the propriety of such special consideration.[21] ATC, which proposed retaining the 1% limitation on co-located media, would make an exception for SBICs, MESBICs and other bona fide investment entities if they do not have any representation on the board of or in the management of the subject company. Life contends that insurance companies should be included as passive investors, as they intend to invest passively and are restricted by state laws and by their obligation to their policy holders and beneficiaries regarding diversification of their portfolios and acceptable levels of investment in individual companies.[22]

31. Several parties propose that the categories of "passive" investors be broadened generally, with Cox/Multimedia proposing a specific set of criteria to be used in place of an exclusive listing of types of institutions. GCD contends that any benchmark considered appropriate for SBICs and MESBICs should be extended to all passive investing institutions, as they are also possible investors in minority broadcasting enterprises. Cox/Multimedia stresses that the Commission has previously recognized the need to treat all similar institutions equally in Docket 20520 and other previous cases.[23]

32. Capital Research contends that there should be no ownership limitation at all on passive investors, with the burden of proof on the Commission to demonstrate on a case by case basis that an investor is not truly passive as it claims, or in the alternative, that it be permitted to submit a disclaimer to achieve this unrestricted status.[24] ABC claims that the Commission's experience with a 5% level for institutions has shown that the level of ownership is too conservative unless coupled with directorship or senior management position.[25] Cox/Multimedia contends that at least 10% is an appropriate ownership level for passive investors and institutions because they are typically precluded from or not interested in influence or control of the companies whose stock they hold, making a prohibition unnecessary. It continues that this passivity is already recognized in the Commission's present attribution rules. Life presses for a benchmark of at least 10% for insurance companies, based on their passivity, regulated status and fiduciary responsibilities. ICI argues in RM-3695 that investment companies and investment advisors should be permitted a 10% benchmark. Harte proposes that the Commission accept a certification by the licensee

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[21] Harte refers to the Commission's distress sale policy and its minority ownership enhancement in its lottery procedures for LPTV and similar services.

[22] Life also asserts that there should be a special exemption for an insurance company's temporary acquisition of securities pursuant to a recapitalization plan under state law.

[23] *Memorandum Opinion and Order* (Docket 20520), 65 FCC 2d 336 (1977); *College Retirement Equities Fund*, 35 FCC 2d 885 (1972); *New York Teachers Retirement System*, FCC 83-16, released Jan. 24. 1983, 52 RR 2d 1695.

[24] Capital Research contends that investment advisors specifically have neither the time, the inclination, nor the incentive to exercise control over their portfolio companies, that safeguards against their exercise of control, including severe sanctions, already exist, and that these safeguards and sanctions will have a stronger effect than any attribution percentage established by this Commission.

[25] Great American has attempted to demonstrate that the "preferred" stockholding level of large institutional investors is often greater than 5%. Great American's sample indicates that at least 12% of those institutional investors reporting to the S.E.C. in 1982 have several holdings above that level.

that no control is exercised by a passive investor in lieu of a disclaimer from the investor.[26]

33. Several other parties respond that the distinction among different types of investors has not been justified and is dubious and unrealistic. Spanish International contends that an individual has no greater ability to exercise influence or control with a given level of ownership than an institution has. ABC asserts that individuals holding 1% to 5% of a company's stock shouldn't be assumed to be less passive than an institution holding the same amount. GE and Taft contend that raising the allowable amount of ownership will eliminate the need for any distinction. (GE supports a 10% benchmark; Taft supports a 5% benchmark.) Spanish International asserts that the concept of "passive" investment is flawed because the Commission has previously determined that the mere assignment of proxies to management constitutes an active, although limited, management role in a company,[27] and that the mere trading and voting of large blocks of stock has been found to wield influence.[28]

34. Capital Research insists that the investment community itself is not homogenous and that venture capitalists, for instance, take an active role in the companies with which they are involved. Citizens asserts that the Commission has already rejected the inclusion of pension funds as passive investors[29] and remarks that some pension funds (for instance, the Teamsters Union) do have an additional incentive to exercise influence over some of their holdings beyond a mere income interest.[30]

35. NASBIC claimed that SBICs are the largest source of venture capital available to new and small growing businesses in this country. It stated that SBICs are investors, not holding companies, although they often provide management and financial counseling to their debtors. It claimed that a combination of equity and long term loans with warrants and debentures, sometimes with conversion rights, is essential to provide SBICs the necessary profit opportunity to obtain their assistance. It was joined by NRBA and T.A. Associates in pointing out that Small Business Administration regulations and SBICs individual charters prohibit control of the companies in which they invest. These parties contended that SBICs should therefore be allowed to hold up to 10% of a companies' voting stock, noting that 10% ownership is the level which is scrutinized by the SBA pursuant to 13 C.F.R. § 107.901. SynCom countered that 10% of voting stock should only be permitted for MESBICs because it is not clear how SBICs promote diversity.

36. Citizens contended that there is no evidentiary showing that SBICs "illegal interest rates" have helped minority owners, and that they may have hurt them by creating untenable financial positions. It claimed that the risk of loss in broadcasting is not particularly high, citing the "inexhaustible demand" for facilities, and gave two examples of new entrants which used SBA financing without surrendering equity in their corporations.

Use of a "Multiplier" for Vertical Ownership

37. Most of the parties commenting on the application of a "multiplier" for assessing attribution in vertical ownership situations favor its use. Many claim that it would provide a more realistic representation of actual influence or control. CapCities asserts that the adoption of a multiplier would substantially reduce the burden of the rules and reduce the difficulties of reporting such indirect interests without threatening the goals of the rules.

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[26] Harte points out that applicants for new and existing facilities are now permitted to certify rather than demonstrate their financial qualifications.

[27] *Report and Order 15627, supra,* at 369.

[28] *Report and Order 20520,* 59 FCC 2d 970, 975 (1976).

[29] *Report and Order 20520, supra.*

[30] Citizens suggests that the Teamsters Union, for example, could have a specific interest in the news or programming practices of any stations it would have an ownership interest in, at least insofar as affairs concerning the Union were represented.

Centennial asserts that use of a multiplier would further encourage investment, increase the diversity of outlets thereby achieving the rules' goals, and reduce antitrust concerns. Licensees add that exceptions should be made in anomalous cases.

38. NBC and Taft oppose the use of a multiplier, claiming that it would permit controlling interests to go unnoticed, although other parties contend that this concern can be relieved by strict reporting requirements. Citizens points out that the Commission has previously rejected the use of a multiplier, in *Report and Order 15627, supra* at 371.

Other Attributable Interests

39. In response to *Notice BC 78-239*, 68 FCC 2d 1302 (1978), several parties first remarked that there has been no showing of abuse or of a real threat to the Commission's ownership rules to justify a change in the general policy of not attributing ownership interests to the non-voting instruments at issue. Life specifically contended that any non-voting interest holds less likelihood of conferring power than a corresponding voting interest. Licensees pointed out that non-voting stock and voting trusts are not included in the provisions of the Investment Companies Act of 1940, the Bank Holding Company Act, the Small Business Administration, or the S.E.C.'s reporting requirements. Citizens countered that no public interest consideration was advanced for accepting the risks of influence pertaining to non-voting interests, and that any party holding a non-voting interest is obviously pursuing only profit and not the public interest, convenience, and necessity.

40. Several commenters noted the importance of non-voting stock in the financing schemes of many licensees. Licensees and Bank of America pointed out that non-voting stock is offered by companies to raise money without diluting control. Several other commenters averred that non-voting stock is often intentionally sought by investors because of its separation from control, and that preferred stock particularly represents an intentional exchange of control for return on investment. Thus, they contend, non-control is the clear desire and intention of both licensee and shareholder where non-voting stock is at issue. Any change, commenters concluded, would disrupt the capital market, imposing a significant cost of regulation with no demonstrable corresponding benefit.

41. Several parties noted that non-voting stock is an important financing tool in media acquisitions and is used as a "sweetener" for venture capitalists to increase their return potential to compensate them for the risk involved in providing "gap" financing. SynCom argued that attributing non-voting stock would result in "credit rationing" by venture capitalists, with a concentration on the largest multiple owners. Accordingly, several parties claimed, attribution of non-voting stock would result in a diminution of diversity as new entrants, those most in need of venture capital, are squeezed out of a critical source of financing, with the direst consequences for minority owners, who have the least broadcast experience and fewest alternative sources of funds.

42. C.I.C. argued that non-voting stock with contingent voting rights should not be attributed if the contingency is beyond the control of the holder, and should be considered on an *ad hoc* basis if the contingency may be within the power of the holder. It further contended that any change in the rules now could not only diminish the value of such stock, but also lock in current holdings, and thereby promote disinterested ownership of licensees. ABC argued that the power residing in non-voting stock depends on the amount of stock held. Most important, it insisted, is that a policy statement is necessary to guide businesses in structuring their arrangements.

43. Bankers contended that lease-back agreements and debt holdings carry no potential for influence or control, and Licensees argued that putting restrictions on the holding of pure debt would reduce the sources of capital available to broadcasters. Life claimed that insurance companies often use debt financing to provide regular income, and that insurance companies should be specifically reserved from the application of any rule adopted, as they are non-

entrepreneurial enterprises. In response to *Notice of Proposed Rule Making* in Docket No. 20521, FCC 75-710, released June 23, 1975, 40 Fed. Reg. 26543 (June 11, 1975), (regarding reporting requirements) several parties commented that the current rule calling for information regarding any contracts restricting licensees' discretion is sufficient (47 C.F.R. §73.3613), and that debt instruments without such provisions are not relevant to the Commission's purposes. Other parties pointed out that the significance of a given dollar amount of debt depended on the size of the corporation and its assets, that there was no need for the entire contracts, parts of which could include confidential information, and that the information would be useful only to the reporting licensee's competitors.

44. Numerous parties continued to insist, in response to *Notice 83-46*, that the Commission should continue to consider only voting rights when attributing the ownership of a company, asserting that parties with non-voting interests in a company do not have a voice in management, and reiterating that, this result is specifically intended by both the issuer and holder of the particular interests. Centennial additionally points out that this is the implication of Section 303(a) of the Uniform Limited Partnership Act of 1976,[31] and claims that exclusion of limited partners from attribution could result in a substantial increase in capital availability. Spanish International, Northwestern, and Cox/Multimedia assert that a limited partner has no ability to influence or control the actions of a licensee and that such an interest should not be cognizable. They contend that this result would parallel attribution of corporation ownership, in that only voting interests are considered. Several commenters reiterate the traditional use and importance of non-voting interests in corporate financing and their effectiveness as insulators, and urge the Commission to codify its present policies regarding interests other than voting interests. Licensees contend that "convertible" interests should be attributed only after the conversion privilege is exercised. Cox/Multimedia contends that attribution should generally follow the power to vote for stock held in trust, and asserts that the power to sell stock in the corpus or to select or replace the trustee are not usually exercised in response to a programming decision of a licensee.

45. Most commenters specifically contended that the Commission should continue to consider trusts on an *ad hoc* basis, arguing that such treatment has sufficed to date and that trusts are so widely varied in form, whether as a result of state laws or individual needs, that any general rule will prove too restrictive. Several parties insisted that trusts can be structured to effectively insulate the trustee from the beneficiary or grantor, although not all trusts currently do so. They contended that trusts are often indispensible tools for managing personal affairs, describing their various uses, and that permitting them to date has not interfered with the Commission's underlying multiple ownership purposes.

46. Bankers declared that trusts are not established to insulate a party so much as to combine votes, and Bank of America stated that it has not encountered any trust used to achieve insulation. Citizens argued that if a voting trust does insulate effectively, the trustee is in the untenable position of owing a duty both to maximize profit and to serve the public interest, convenience, and necessity.

47. There was considerable disagreement among commenters as to what provisions of a trust are relevant in attributing ownership of the assets of the trust. Those parties that did address specific trust provisions generally agreed that a power to change trustees or to revoke the trust does warrant attribution of ownership. SynCom contended that a grantor's retention of the power to dispose of the trust stock indicates an unwillingness to abdicate control and interferes with the ability of the trustee to manage the trust; Harte claimed that the power to sell can adversely affect the market value of securities. Bonneville contended, on

[31] That section states that "a limited partner is not liable for the obligation of a limited partnership unless ... in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business." 6 U.L.A. § 303(a).

the other hand, that the power to sell is irrelevant, as non-public stock cannot be readily sold and the sale of public stock to influence a company is subject to S.E.C. jurisdiction. It further claimed that reserving the power to sell is important to protect the value of the stock, and that if a threat to sell is used to influence a licensee, the licensee can turn to the Commission for recourse. Licensees argued that the beneficiary of a trust has no reasonable expectation of corporate influence or plausible opportunity to affect programming decisions and is unlikely to sell stock or change trustees based on programming decisions of a licensee. ABC contended that the size of a trust should determine whether an ownership interest is attributed to the beneficiary, stating that it is contrary to common sense to believe that a large interest can be effectively insulated, while a small interest is of little importance regardless of the voting power. It proposed the adoption of a 5% benchmark for trusts, rebuttable for larger holdings.

Officers and Directors

48. Several parties contend that the inclusion of a corporation's officers and directors among those with cognizable interests in that corporation restricts the availability of competent officers and directors, particularly those with media expertise. They continue that an insulation device should be developed or the use of a disclaimer permitted. CapCities asserts that there is no countervailing reason not to do so, and Stein claims that experience shows the willingness of affected parties to comply. Northwestern suggests that such a pledge could be included in the appropriate station's public file and its ownership file at the Commission. Citizens asserts, however, that such insulation would be at odds with the fiduciary responsibility of an officer, director, or partner.

49. Cox/Multimedia contends that the alternative of individual waiver rulings would cause unacceptable delay. Other parties support retention of the current policy of attributing interests to officers and directors, with the consideration of contrary showings, as they see no alternate, satisfactory general rule. Licensees assert that such showings are allowed regarding the alien ownership provisions, and CBS points out that the Securities and Exchange Commission's disclosure requirement does not include directorships, and that such contests would arise infrequently. It continues that the interests of a non-employee director of more than one licensee corporation should not be aggregated. Such interests represent no threat to the goals of the multiple ownership rules, it contends, as such persons have no specific business decision-making authority in a widely-held corporation (in CBS's experience). It also claims that the activities of an officer or director are restricted in any case by the interlocking director restriction of the Clayton Act.[32] Life contends that at least the officers and directors of insurance companies should be excluded as insurance companies have only passive investment interests and insulation is provided by the basic investment character of insurance company's holdings. GCD proposes that directors from a parent company can attribution for the parent only when they constitute 25% of the board of the subject company, drawing on the parallel restriction of the alien ownership provision.[33]

Reporting Requirements

50. In response to *Notice 20521, supra*, most parties welcomed the Commission's inclination to standardize the ownership information required on various forms, but a few pointed out that the various forms serve different purposes, and standardization is not desirable to the extent that it results in making all forms unnecessarily complex or inclusive for their purposes.

51. Most parties opposed the suggestion of submitting information on all of the top thirty shareholders in each corporation and the top ten holdings held by each custodial holder in the top thirty. They argued that the information was simply unnecessary in most cases, claiming

[32] 15 U.S.C. § 19.

[33] 47 U.S.C. § 310(b).

that this requirement would result in the reporting of small and meaningless interests, many of which would be non-cognizable. They also contended that it is unfair to put the responsibility for the accuracy of the information on the licensee, since licensees do not hold the information themselves, but must rely on other parties who have historically been reluctant to cooperate. Comments filed by two different groups of licensees recommend retention of the 1% shareholder standard and suggest that the problem of correctly aggregating the interests of one person which are dispersed among several custodial holders can be resolved by requiring all parties with a reportable interest that is not obvious from stockholder records to report its interest to the licensee. They contended that most omissions of cognizable interests are inadvertent and that this requirement would remedy the problem. One of the licensee groups also recommended that the Commission require the reporting of all 0.25% interests held by custodial holders, for the purpose of aggregating accounts held with several nominees.

52. Virtually all commenting parties claimed that the other business interests of a licensee's principals are not relevant if not broadcast-related, and that past broadcast-related interests are not relevant beyond a few years, if at all. They contended that the proposed requirements were drawn too broadly and imprecisely, and that any such interest that may be relevant should only be reported if it amounts to a cognizable interest.

53. Most parties were opposed to the proposal for a separate complete report for all companies which held 10% or more of a licensee's stock, arguing that such reporting would produce voluminous unnecessary information and was not justified by a cost/benefit analysis. Cox/Multimedia more recently remarks that the 25% holding company requirement for a separate report responds to the alien ownership provisions. RKO and Rust argued that such companies should only be required to file a complete report if in clear control of the licensee while ABC contended that "control" is too imprecise a term, and the Commission should use a strict percentage guideline. RKO further suggested that in any case, the responsibility for the report should not stand with the licensee, as the information is not within the licensee's control.

54. Various parties contended that there is no need to report the income beneficiaries of trusts, contending that such interests are beyond the scope of the Commission's purposes in its multiple ownership rules, and that the information is very difficult to obtain in many cases.

55. Parties supporting the adoption of the complete MCDR included Senators Metcalf and Abourezk, Michigan State University, which claimed it needed the information for industrial research, and the Council on Economic Priorties and the Coalition for Responsible Investment, which were concerned with the social implications of their investments. Citizens for Cable Awareness in Pennsylvania and Philadelphia Community Cable Coalition generally argued that the Commission should act to discourage the advancement of institutional ownership in the media.

56. The question of whether the benchmark for reporting ownership should be the same as for determining attribution of ownership has emerged as a distinct issue in the analysis of several commenters responding to *Notice 83-46*. Gaylord maintains that the two benchmarks serve different purposes, with the reporting benchmark affecting the Commission's ability to assess and monitor *de facto* control. Citizens, Licensees and NRBA also maintain that reporting is essential to enforcement of the rules. NRBA specifically contends that retention of the current benchmark for reporting purposes would recognize the "acknowledged reality" that influence or control is not solely a function of ownership interests. Licensees further contend that it is especially important to have this ownership information following a drastic change in the rules, the consequences of which cannot be foreseen, and it points out that a 1% reporting benchmark can later be raised if it proves unnecessarily conservative.

57. Most other parties which specify a particular reporting benchmark as appropriate propose the adoption of a "5% of voting interest" standard, several in conjunction with their prosposal for a 5% attribution benchmark and others as a separate benchmark for reporting, lower than that they propose for attribution of ownership. Those parties universally support the 5% figure in recognition of the Securities and Exchange Commission's disclosure requirements. They assert that this reporting level will relieve licensees of the burden of reporting unnecessary information with no adverse effect on the public interest. Metromedia and CapCities assert that a reporting level lower than 5% would perpetuate the current difficulties encountered when institutional shareholders are reluctant to disclose information on the parties for whom they hold stock, and CapCities maintains that the current reporting of these smaller interests is often inaccurate.[34] Gaylord comments that the reporting benchmark can later be raised if it proves unnecessarily conservative. Several parties counter that reporting non-attributable interests would be irrelevant and an unnecessary burden.

58. Several parties argue that the periodic and routine ownership reports required from widely-held corporations require a considerable effort with no corresponding public benefit. Capital Research asserts that they cause a diversion of the capital directed by investment advisors who are reluctant to assume this additional cost/burden when directing funds. Cox/Multimedia points out that information regarding alien ownership, which is a statutory concern, is only required with specific applications.

Effect on Cross Interest Policies

59. Some parties responding to *Notice 83-46* address themselves to the need for or desirability of uniformity of attribution levels and rules among the various multiple ownership and cross interest rules. Presuming that a higher attribution benchmark is adopted, CapCities and Tribune urge the uniform application of that benchmark. Cox/Multimedia contends that the various multiple ownership and cross interest rules have the same policy objective. It continues that a contrary conclusion would undercut the validity of a determination that a specific level of shareholding was appropriate to attribute the ownership of a licensee, and that uniformity of application is needed for understandability, predictability, and ease of administration of the rules. CapCities asserts that making a distinction for a special case would be arbitrary. In response to *Further Notice 20548, supra*, which proposed its modifications for only three of the multiple ownership rules, NCCB, Rust, and NAB contended that there was no reason given for separating the "seven station" rule from the others for attribution purposes. Rust and NAB contended that any new benchmark should be extended to broadcast/cable cross ownership rules as well.

60. Other parties contend that the various rules have different rationales. CapCities contends that the policy regarding cross interests requires separate consideration as far as interests in the same service are concerned, because these rules involve direct competition and preservation of arm's-length bargaining. ABC made essentially the same argument in response to *Further Notice 20548, supra*. ATC argues for special restrictive consideration for rules concerning co-located media, as they occasion the most incentive to exercise influence and the most potential for anti-competitive activity due to their unique relationships in local politics and franchising. LIN proposes retaining the present attribution rule for the broadcast/cable holdings of programming production and distribution companies, since such parties would have more incentive than others to control a licensees' programming and could thus present a serious restriction of a licensees' freedom in making programming selections/decisions.

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[34] Several parties urge the adoption of the Securities and Exchange Commission's "beneficial owner" standard for determining what interests should be reported, and the use of the SEC's corresponding forms, particularly its "13(g)" provisions.

Enforcement of the Rules

61. Taft, NBC, and CapCities urge the Commission to direct its future enforcement efforts against shareholders rather than against licensees. They contend that a licensee cannot control who holds its stock or force a divestiture if a Commission rule is violated. They maintain that such enforcement has previously been employed by the Commission, pointing out various divestiture cases as examples, and NBC asserts that Sections 4(i) and 303(r) of the Communications Act (47 U.S.C. §§ 4(i), 303(r)) provide the Commission with the requisite authority. Cox/Multimedia contends that Section 503(b)(B) of the Act (47 U.S.C. § 503(b)(B)) was specifically added to provide just such an enforcement provision.

Appendix C

1. 47 C.F.R. Part 73 is amended by removing Section 73.35.

2. 47 C.F.R. Part 73 is amended by removing Section 73.240.

3. 47 C.F.R. Part 73 is amended by removing Section 73.636.

4. Section 73.3555 is added to 47 C.F.R. Part 73 to read as follows:

§ 73.3555 Multiple Ownership.

(a) No license for an AM, FM, or TV broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates, or controls one or more broadcast stations in the same service and the grant of such license will result in:

(1) any overlap of the predicted or measured 1 mV/m groundwave contours of the existing and proposed AM stations, computed in accordance with § 73.183 or § 73.186; or

(2) any overlap of the predicted 1 mV/m contours of the existing and proposed FM stations, computed in accordance with § 73.313; or

(3) any overlap of the Grade B contours of the existing and proposed TV stations, computed in accordance with § 73.684.

(b) No license for an AM, FM, or TV broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates, or controls one or more such broadcast stations and the grant of such license will result in:

(1) the predicted or measured 2 mV/m groundwave contour of an existing or proposed AM station, computed in accordance with § 73.183 or § 73.186, encompassing the entire community of license of an existing or proposed TV broadcast station(s) or the Grade A contour(s) of the TV broadcast station(s), computed in accordance with § 73.684, encompassing the entire community of license of the AM station; or

(2) the predicted 1 mV/m contour of an existing or proposed FM station, computed in accordance with § 73.313, encompassing the entire community of license of an existing or proposed TV broadcast station(s) or the Grade A contour(s) of the TV broadcast station(s), computed in accordance with § 73.684, encompassing the entire community of license of the FM station.

(c) No license for an AM, FM, or TV broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates, or controls a daily newspaper and the grant of such license will result in:

(1) the predicted or measured 2 mV/m contour for an AM station, computed in accordance with § 73.186, encompassing the entire community in which such newspaper is published; or

(2) the predicted 1 mV/m contour for an FM station, computed in accordance with § 73.313, encompassing the entire community in which such newspaper is published; or

(3) the Grade A contour for a TV station, computed in accordance with § 73.684, encompassing the entire community in which such newspaper is published.

(d) No license for an AM, FM, or TV broadcast station shall be granted to any party (including all parties under common control) if such party, or any stockholder, officer or director of such party, directly or indirectly owns, operates, controls, or has any interest in, or is an officer on director of any other broadcast station in the same service, if the grant of such license would result in a concentration of control of broadcasting in a manner inconsistent which the public interest, convenience, or necessity. The FCC, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience or necessity for any party on any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than seven AM, seven FM, or seven TV broadcast stations (no more than five of which may be in the VHF band); or of three broadcast stations in one or several services, where any two are within 100 miles of the third (measured city to city), if there is primary service contour overlap of any of the stations.

(e) The reference points which shall be used for city- to-city measurements are those listed in the Index to the *National Atlas of the United States of America*, United States Department of Interior, Geological Survey, Washington, D.C., 1970. (Future editions will supersede.) In the case of any community of license which is not referenced by the National Atlas, such as a newly established community, the point of reference shall be the main post office until such town is referenced. The National Atlas is available for reference at most public libraries and at the FCC in Washington.

(f) No renewal of license shall be granted for a term extending beyond January 1, 1980, to any party that as of January 1, 1975, directly or indirectly owns, operates or controls the only daily newspaper published in a community and also as of January 1, 1975, directly or indirectly owns, operates or controls the only commercial aural station or stations encompassing the entire community with a city-grade signal during daytime hours (predicted or measured signal for AM, predicted for FM), or the only commercial TV station encompassing the entire community with a city-grade signal. The provisions of this paragraph shall not require divestiture of any interest not in conformity with its provisions earlier than January 1, 1980. Divestiture is not required for aural stations if there is a separately owned, operated or controlled TV broadcast station licensed to serve the community.

(g) This section is not applicable to noncommercial educational FM and noncommercial educational TV stations.

NOTE 1: The word "control" as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.

NOTE 2: In applying the provisions of this section, ownership and other interests in broadcast licensees, cable television systems and daily newspapers will be attributed to their holders and deemed cognizable pursuant to the following criteria:

(a) Except as otherwise provided herein, partnership and direct ownership interests and any voting stock interest amounting to 5% or more of the outstanding voting stock of a corporate broadcast licensee, cable television system or daily newspaper will be cognizable;

(b) No minority voting stock interest will be cognizable if there is a single holder of more than 50% of the outstanding voting stock of the corporate broadcast licensee, cable television system or daily newspaper in which the minority interest is held;

(c) Investment companies, as defined in 15 U.S.C. §80a-3, insurance companies and banks holding stock through their trust departments in trust accounts will be considered to have a cognizable interest only if they hold 10% or more of the outstanding voting stock of a corporate broadcast licensee, cable television system or daily newspaper, or if any of the officers or directors of the broadcast licensee, cable television system or daily newspaper are representatives of the investment company, insurance company or bank concerned. Holdings by a bank or insurance company will be aggregated if the bank or insurance company has any right to determine how the stock will be voted. Holdings by investment companies will be aggregated if under common management.

(d) Attribution of ownership interest in a broadcast licensee, cable television system or daily newspaper that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that wherever the ownership percentage for any link in the chain exceeds 50%, it shall not be included for purposes of this multiplication. [For example, if A owns 10% of company X, which owns 60% of company Y, which owns 25% of "Licensee", then X's interest in "Licensee" would be 25% (the same as Y's interest since X's interest in Y exceeds 50%), and A's interest in "Licensee" would be 2.5% (0.1 x 0.25). Under the 5% attribution benchmark, X's interest in "Licensee" would be cognizable, while A's interest would not be cognizable.]

(e) Voting stock interests held in trust shall be attributed to any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at will. If the trustee has a familial, personal or extra- trust busiess relationship to the grantor or the beneficiary, the grantor or beneficiary, as appropriate, will be attributed with the stock interest held in trust. An otherwise qualified trust will be ineffective to insulate the grantor or beneficiary from attribution with the trust's assets unless all voting stock interests held by the grantor or beneficiary in the relevant broadcast licensee, cable television system or daily newspaper are subject to said trust.

(f) Holders of non-voting stock shall not be attributed an interest in the issuing entity. Holders of debt and instruments such as warrants, convertible debentures, options or other non-voting interests with rights of conversion to voting interests shall not be attributed unless and until conversion is effected.

(g) Limited partnership interests shall not be attributed to limited partners if the relevant partnership agreement complies in all significant respects with the provisions of the Model Limited Partnership Act of 1976 (6 U.L.A. §101, *et seq.*) and the limited partners are not otherwise involved in any material respect in the management or operation of the licensee, cable television system or daily newspaper or its facilities, *provided* that the licensee or system concerned so certifies.

(h) Officers and directors of a broadcast licensee, cable television system or daily newspaper are considered to have a cognizable interest in the entity with which they are so associated. If any such entity engages in businesses in addition to its primary business of broadcasting, cable television service or newspaper publication, it may request the Commission to waive attribution for any officer or director whose duties and responsibilities are wholly unrelated to its primary business. The officers and directors of a parent company of a broadcast licensee, cable television system or daily newspaper, with an

attributable interest in any such subsidiary entity, shall be deemed to have a cognizable interest in the subsidiary unless the duties and responsibilities of the officer or director involved are wholly unrelated to the broadcast licensee, cable television system or daily newspaper subsidiary, and a statement properly documenting this fact is submitted to the Commission. [This statement may be included on the appropriate Ownership Report]. The officers and directors of a sister corporation of a broadcast licensee, cable television system or daily newspaper shall not be attributed with ownership of these entities by virtue of such status.

NOTE 3: In cases where record and beneficial ownership of voting stock is not identical (*e.g.*, bank nominees holding stock as record owners for the benefit of mutual funds, brokerage houses holding stock in street names for the benefit of customers, investment advisors holding stock in their own names for the benefit of clients, and insurance companies holding stock), the party having the right to determine how the stock will be voted will be considered to own it for purposes of these rules.

NOTE 4: Paragraphs (a)-(d) of this section will not be applied so as to require divestiture, by any licensee, of existing facilities, and will not apply to applications for increased power for Class IV stations, to applications for assignment of license or transfer of control filed in accordance with §§73.3540(f) or 73.3541(b) of this part, or to applications for assignment of license or transfer of control to heirs or legatees by will or intestacy if no new or increased overlap would be created between commonly owned, operated or controlled broadcast stations in the same service and if no new encompassment of communities proscribed in paragraphs (b) and (c) of this section as to commonly owned, operated, or controlled broadcast stations or daily newspapers would result. Said paragraphs will apply to all applications for new stations, to all other applications for assignment or transfer, and to all applications for major changes in existing stations except major changes that will result in overlap of contours of broadcast stations in the same service with each other no greater than already existing. (The resulting areas of overlap of contours of such broadcast stations with each other in such major change cases may consist partly or entirely of new terrain. However, if the population in the resulting overlap areas substantially exceeds that in the previously existing overlap areas, the Commission will not grant the application if it finds that to do so would be against the public interest, convenience, or necessity.) This section will not apply to major changes in UHF television broadcast stations authorized as of September 30, 1964, which will result in Grade B overlap with another television station that was commonly owned, operated, or controlled as of September 30, 1964; or to any broadcast application where grant of such application would result in the Grade A contour of an existing or proposed UHF station encompassing the entire community of license of an existing or proposed AM or FM broadcast station that is commonly owned, operated or controlled or would result in the entire community of license of such UHF station being encompassed by the 2 mV/m contour of such AM broadcast station or the 1 mV/m contour of such FM broadcast station. Such UHF overlap or community encompassment cases will be handled on a case-by-case basis in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest. Commonly owned, operated, or controlled broadcast stations, with overlapping contours or with community-encompassing contours prohibited by this section may not be assigned or transferred to a single person, group, or entity, except as provided above in this note. If a commonly owned, operated, or controlled broadcast station and daily newspaper fall within the encompassing proscription of this section, the station may not be assigned to a single person, group or entity if the newspaper is being simultaneously sold to such single person, group or entity.

NOTE 5: Paragraphs (a)-(d) of this section will not be applied to cases involving television stations which are primarily "satellite" operations. Such cases will be considered on a case-by-case basis in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest. Whether or not a particular television broadcast station which does not present a substantial amount of locally originated programming is primarily a "satellite" operation will be determined on the facts of the particular case. An authorized and operating "satellite" television station the Grade B contour of which overlaps that of a commonly owned, operated, or controlled "non-satellite" parent television broadcast station, or the Grade A contour of which completely encompasses the community of publication of a commonly owned, operated, or controlled daily newspaper, or the community of license of a commonly owned, operated, or controlled AM or FM broadcast station, or the community of license of which is completely encompassed by the 2 mV/m contour of such AM broadcast station or the 1 mV/m contour of such FM broadcast station may subsequently become a "non-satellite" station with local studios and locally originated programming. However, such commonly owned, operated, or controlled "non-satellite" television stations with Grade B overlap or such commonly owned, operated, or controlled "non-satellite" television stations and AM or FM stations with the aforementioned community encompassment, may not be transferred or assigned to a single person, group, or entity except as provided in Note 3. Nor shall any application for assignment or transfer concerning such "non-satellite" stations be granted if the assignment or transfer would be to the same person, group or entity to which the commonly owned, operated, or controlled newspaper is proposed to be transferred, except as provided in Note 3.

NOTE 6: For the purposes of this section a daily newspaper is one which is published four or more days per week, which is in the English language and which is circulated generally in the community of publication. A college newspaper is not considered as being circulated generally.

NOTE 7: For the purposes of the three station regional concentration provision of this section, (a) an application raising a regional concentration of control issue which involves overlap of or by one or more UHF television stations will be treated on a case-by-case basis, consistent with the precedents of UHF determinations made under the one-to-a-market proscriptions of this section, and (b) AM and FM broadcast stations licensed to communities which are within 15 miles (city reference point to reference point) and/or within the same urbanized area (as mapped by the U.S. Bureau of the Census), will be considered as a combination and counted as one station.

Appendix D

47 C.F.R. §73.3615 is amended by revising paragraph (a), subparagraphs (a)(2), (a)(3)(i), (a)(3)(iv), (a)(3)(iv)(A) and (B); by removing subparagraph (a)(3)(iv)(C); by revising paragraph (c) in its entirety; and by removing paragraph (d) in its entirety and marking it [RESERVED], as follows:

§ 73.3615 Ownership reports.

(a) Each licensee of a commercial AM, FM, or TV broadcast station which is not a sole proprietorship or 50/50 partnership shall file an Ownership Report on FCC Form 323 once a year, on the anniversary of the date that its renewal application is required to be filed. [Sole proprietorships and 50/50 partnerships will file ownership information in connection with the application process]. Licensees owning multiple stations with different anniversary dates need file only one Report per year on the anniversary of their choice, provided that their Reports are not more than one year apart. A licensee with a current and unamended Report on file at the Commission may certify that it has reviewed its current Report and that it is accurate, in lieu of filing a new Report.

Ownership Reports shall provide the following information as of a date not more than 60 days prior to the filing of the Report:

(1) * * *

(2) In the case of a partnership, the name of each partner and the interest of each partner. A limited partner need not be reported, regardless of the extent of its ownership, if the limited partnership conforms in all major respects with the Uniform Limited Partnership Act of 1976 (6 U.L.A. §101 *et seq.*) and if the limited partner is not otherwise involved in any material respect in the business of the licensee or the operation of the station;

* * * * *

(3) * * *

(i) The name, residence, citizenship, and stockholding of every officer, director, trustee, executor, administrator, receiver, partner, member of an association, and any stockholder which holds stock accounting for 5% or more of the votes of the corporation, except that an investment company, insurance company, or bank trust department need be reported only if it holds stock amounting to 10% or more of the votes, and the licensee certifies that such entity has made no attempt to influence, directly or indirectly, the management or operations of the licensee, and that there is no representation on the licensee's board or among its officers by any person professionally or otherwise associated with the entity. A licensee shall report any separate interests known to be held ultimately by the same person or entity if those interests, when aggregated, exceed the ownership benchmarks herein, whether those interests are held in custodial accounts or by individual holding corporations. If the majority of the voting stock of a corporate licensee is held by any single person or entity, no other stockholding need be reported for that licensee;

* * * * *

(iv) Full information with respect to the interest and identity of any person having any direct, indirect, fiduciary, or beneficial interest in the licensee or in its stock accounting for 5% or more of its votes. For example:

(A) Where A is the trustee of stock held for beneficiary B, A shall be reported if A votes the stock or has the sole or shared power to dispose of the stock; B or any other party shall be reported if B or such party votes the stock or has sole power to dispose of the stock or has the power to revoke the trust or replace the trustee at will;

(B) Where X corporation (or association or partnership) controls the licensee or holds stock accounting for 5% or more of the votes, another Report shall be filed for X; that Report shall include the same information as required of a licensee, but with respect to owners or shareholders of X, only those whose voting interest in X multiplied by X's voting interest in the licensee accounts for 5% or more of licensee's votes (10% for investment companies, insurance companies, and bank trust departments) shall be reported, as well as officers and directors; for those officers and directors with responsibilities not involving the licensee who wish to be relieved of attribution in the licensee, report the name, title and duties, and an explanation of why their duties do not involve the licensee. If one of the reportable stockholders or owners is yet another corporation, Y, the same procedure shall be followed with respect to Y corporation.

* * * * *

(c) Before any change is made in the organization, capitalization, officers, directors, or stockholders of a corporation other than licensee or permittee, which results in a change

in the control of the licensee or permittee, prior FCC consent must be received under §73.3540. A transfer of control takes place when an individual or group in privity, gains or loses affirmative or negative (50%) control. See instructions on FCC Form 323 (Ownership Report).

(d) [Reserved]

* * * * *

Appendix E

47 C.F.R. §76.501 is amended by revising Notes 1, 2 and 3 to read as follows:

* * * * *

NOTE 1: The word "control" as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.

NOTE 2: In applying the provisions of this section, ownership and other interests in broadcast licensees and cable television systems will be attributed to their holders and deemed cognizable pursuant to the following criteria:

(a) Except as otherwise provided herein, partnership and direct ownership interests and any voting stock interest amounting to 5% or more of the outstanding voting stock of a corporate broadcast licensee or cable television system will be cognizable;

(b) No minority voting stock interest will be cognizable if there is a single holder of more than 50% of the outstanding voting stock of the corporate broadcast licensee or cable television system in which the minority interest is held;

(c) Investment companies, as defined in 15 U.S.C. §80a-3, insurance companies and banks holding stock through their trust departments in trust accounts will be considered to have a cognizable interest only if they hold 10% or more of the outstanding voting stock of a corporate broadcast licensee or cable television system, or if any of the officers or directors of the broadcast licensee or cable television system are representatives of the investment company, insurance company or bank concerned. Holdings by a bank or insurance company will be aggregated if the bank or insurance company has any right to determine how the stock will be voted. Holdings by investment companies will be aggregated if under common management.

(d) Attribution of ownership interests in a broadcast licensee or cable television system that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that wherever the ownership percentage for any link in the chain exceeds 50%, it shall not be included for purposes of this multiplication. [For example, if A owns 10% of company X, which owns 60% of company Y, which owns 25% of "Licensee", then X's interest in "Licensee" would be 25% (the same as Y's interest since X's interest in Y exceeds 50%), and A's interest in "Licensee" would be 2.5% (0.1 x 0.25). Under the 5% attribution benchmark, X's interest in "Licensee" would be cognizable, while A's interest would not be cognizable.]

(e) Voting stock interests held in trust shall be attributed to any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at will. If the trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary, the grantor or beneficiary, as appropriate, will be

attributed with the stock interests held in trust. An otherwise qualified trust will be ineffective to insulate the grantor or beneficiary from attribution with the trust's assets unless all voting stock interests held by the grantor or beneficiary in the relevant broadcast licensee or cable television system are subject to said trust.

(f) Holders of non-voting stock shall not be attributed an interest in the issuing entity. Holders of debt and instruments such as warrants, convertible debentures, options or other non-voting interests with rights of conversion to voting interests shall not be attributed unless and until conversion is effected.

(g) Limited partnership interests shall not be attributed to limited partners if the relevant partnership agreement complies in all significant respects with the provisions of the Model Limited Partnership Act of 1976 (6 U.L.A. §101, *et seq.*) and the limited partners are not otherwise involved in any material respect in the management or operation of the licensee or cable television system or its facilities, *provided* that the licensee or system concerned so certifies.

(h) Officers and directors of a broadcast licensee or cable television system are considered to have a cognizable interest in the entity with which they are so associated. If any such entity engages in businesses in addition to its primary business of broadcasting or cable television service, it may request the Commission to waive attribution for any officer or director whose duties and responsibilities are wholly unrelated to its primary business. The officers and directors of a parent company of a broadcast licensee or cable television system, with an attributable interest in any such subsidiary entity, shall be deemed to have a cognizable interest in the subsidiary unless the duties and responsibilities of the officer or director involved are wholly unrelated to the broadcast licensee or cable television system subsidiary, and a statement properly documenting this fact is submitted to the Commission. [This statement may be included on the appropriate Ownership Report]. The officers and directors of a sister corporation of a broadcast licensee or cable television system shall not be attributed with ownership of these entities by virtue of such status.

NOTE 3: In cases where record and beneficial ownership of voting stock is not identical (*e.g.*, bank nominees holding stock as record owners for the benefit of mutual funds, brokerage houses holding stock in street names for the benefit of customers, investment advisors holding stock in their own names for the benefit of clients, and insurance companies holding stock), the party having the right to determine how the stock will be voted will be considered to own it for purposes of these rules.

* * * * *

Appendix F

Regulatory Flexibility Analysis

I. *Need for and Objectives of the Rule.* This action was prompted by the Commission's desire to redefine and update its policies and rules that attribute broadcast, cable television and newspaper ownership interests to certain persons and entities for purposes of enforcing the Commission's multiple ownership rules. The current attribution rules were based on market and economic conditions of forty years ago, and had evolved individually in such a way as to be disjointed and inconsistent. The rules adopted herein are designed to be more relevant and effective in the current marketplace, to eliminate any unnecessary burden on licensees, and to make the rules clearer and more easily complied with, while still maintaining a viable attribution mechanism to support the multiple ownership rules.

II. *Issues Raised in Response to the Initial Regulatory Flexibility Analysis.* No issues were raised specifically in response to the initial regulatory flexibility analysis. Generally, commenters argued, and the Commission agreed, that the current rules restrict investment beyond the extent necessary to enforce the multiple ownership provisions, and in so doing, place an unwarranted and significant burden on licensees to report their ownership and to otherwise conform to attribution requirements. In response, the Commission increased the level of ownership interest necessary to confer on any party a cognizable interest in a licensee and specifically exempted certain kinds of non-voting ownership from attribution. Ownership reporting requirements were adjusted appropriately.

III. *Significant Alternatives Considered and Rejected.* The Commission considered maintaining the current 1% attribution benchmark, as well as adopting benchmarks higher than those adopted herein, such as 10% and 20%. These alternative benchmarks were determined to be less accurate than those adopted in identifying the interests of concern to the Commission in the context of its multiple ownership rules. Moreover, these alternative standards were found to provide no significant benefit sufficient to justify their use. The Commission also considered a variety of reporting requirements, including reporting of various non-attributable interests, but determined that information regarding these interests was not necessary because the interests themselves were found to be not significant for attribution purposes.

SEPARATE STATEMENT OF COMMISSIONER HENRY M. RIVERA

RE: Report and Order In the Matter of Corporate Ownership Reporting and Disclosure by Broadcast Licenses

This Report and Order continues the Commission's ill-advised piecemeal approach to revision of the broadcast multiple ownership rules. As I have previously said, "[p]icking off longstanding ownership rules one by one can only produce disjointed results, and give credence to criticism that this agency has abandoned its interest in promoting diversity of expression through effective structural restraints."[1] Not a single persuasive reason has been advanced to justify action in this proceeding before other pending ownership rulemaking proposals are presented to the Commission for final decision.[2] Whatever one's philosophical leanings may be regarding the ultimate outcome if our ownership proceedings, to proceed in this

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[1] *Notice of Proposed Rulemaking in the Matter of Corporate Ownership Reporting and Disclosure by Broadcast Licenses,* 48 Fed. Reg. 10082 (March 10, 1983) (Joint Concurring Statement of Commissioners Henry M. Rivera and Joseph R. Fogarty).

[2] The suggestion that immediate action in this proceeding will benefit minorities does not offer credible justification for the Commission's premature action. If the Commission were specifically interested in responding to the needs of prospective minority owners, it could have easily tailored rule changes to advance this narrow purpose.

The additional suggestion by some Commissioners that immediate action is called for to stimulate the flow of capital into the broadcast industry is equally specious. There is no record evidence that the broadcast industry, in general, is suffering from a lack of capital or that this Order would relieve any shortfall that may exist.

illogical, disjointed fashion makes no sense. When I asked why we were proceeding in this manner at the meeting at which this Report and Order was adopted, no one could explain. However, the Commission's insistence on changing ownership rules piecemeal, without reference to the cumulative impact of these changes on the structure of the broadcast industry, makes plain that this agency is no longer genuinely committed to maximizing diversity in the media.[3]

Regardless of how the other ownership rules are altered, the Commission's failure to consider the effect of these rule revisions in tandem with other ownership rule changes surely has set the stage for public policy errors. For example, if national and regional ownership rules are repealed, leaving only local ownership limitations, more restrictive or different attribution rules might be in order to assure maximum media diversity in "sacrosanct" local markets. By its premature decision here, the Commission makes any reasonable consideration of such interrelationships impossible.[4]

In the face of this handicap, I do not understand how a Commissioner can be expected to make an informed judgment about the merits of the revisions adopted herein. Therefore, with great regret, I abstain from participating in this decision.

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[3] It is no answer to say that these rules are merely procedural and, thus, can be revised without reference to substantive multiple ownership restrictions. The attribution rules are the engines powering the multiple ownership limitations. Depending on the ownership rule at issue, the FCC's attribution criteria may vary. *See Further Notice of Proposed Rulemaking*, 63 FCC 2d 834 832 (1977) (proposing separate attribution benchmark for seven station rule.)

[4] Of course, further revision of the attribution rules is always theoretically possible, but as a practical matter it is most unlikely that the Commission will return to more conservative rules. Even if the FCC were disposed to do so, however, it surely would not require divestiture of stations acquired pursuant to liberalized attribution rules to bring owners into conformity with further rule changes.

Air Hazard Issues
Application, Amendment of, After Designation
Comparative Criteria
Diversification of Control
Management and Ownership, Integration of

Review Board affirmed *ID* and granted TV application meriting slight-to-moderate integration preference. No diversification preference awarded. ALJ properly accepted post-hearing amendment supplying FAA certification but not changing underlying proposal. —*Commanche Broadcasting, Inc.*
BC Docket No. 82-608

FCC 84R-4

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	
Commanche Broadcasting, Inc. Kerrville, Texas	BC Docket No. 82-608 File No. BPCT-820208KE
Hispanic American Broadcasting of Texas, Inc. Kerrville, Texas	BC Docket No. 82-610 File No. BPCT-820416KE
For Construction Permit	

APPEARANCES

Harry F. Cole, on behalf of Commanche Broadcasting, Inc.; and *William M. Barnard* and *Mark Van Bergh*, on behalf of Hispanic American Broadcasting of Texas, Inc.

DECISION

Adopted: January 13, 1984; Released: January 19, 1984

BOARD MEMBER BLUMENTHAL FOR THE REVIEW BOARD:

1. This proceeding involves the mutually exclusive applications of Commanche Broadcasting, Inc. (Commanche) and Hispanic American Broadcasting of Texas, Inc. (Hispanic) for authority to construct a new commercial television station to operate on Channel 35 at Kerrville, Texas. By *Hearing Designation Order*, 47 Fed. Reg. 41625, published September 21, 1982, the applications were designated for consolidated hearing on an issue to determine whether Hispanic's proposed antenna tower would constitute a hazard to air navigation, as well as on the standard comparative issue.[1] [2] In an *Initial Decision* (*I.D.*), FCC 83D-42, released July 29, 1983, presiding Administrative Law Judge (ALJ) James F. Tierney granted the Hispanic application after first resolving the air hazard issue in its favor and then concluding that Hispanic was comparatively the best applicant. Specifically, the ALJ: (a) assessed a slight diversification demerit against Commanche because its sole attributable media ownership interest is in an AM broadcast station located within the State of Texas, whereas Hispanic's sole attributable interest is in a permittee of a new television station located in Key West, Florida, which is hundreds of miles from Kerrville, *I.D.*, paras. 28-29; and (b) awarded Hispanic an integration preference for its proposed 24.5% full-time and 24.5% part-time quantitative integration, plus qualitative enhancements for minority ownership and residence within the service area, compared to Commanche's 100% "substantial" part-time quantitative credit, enhanced qualitatively by local residence, civic participation, and female ownership participation. *Id.*, paras. 30-41.

2. The proceeding is now before the Review Board on exceptions filed August 29, 1983 by Commanche (Commanche Br.) and a reply brief filed by Hispanic on September 14, 1983 and supplemented on October 19, 1983 (Hispanic Br.).[3] The Board has reviewed the *I.D.* in light of the exceptions and briefs, the oral argument held November 18, 1983, and our examination of the record. We adopt the *I.D.'s* findings of fact and conclusions of

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[1] The application of Tierra Del Sol Broadcasting Corporation (File No. BPCT-820413KE), also designated for consolidated comparative hearing, was subsequently dismissed at the applicant's request. *Order*, FCC 83M-484, released February 9, 1983 (ALJ).

[2] The *Designation Order* (paras. 2, 7) also found that Commanche did not adequately demonstrate its financial qualifications, and it allowed Commanche thirty days to certify that it is financially qualified. Subsequently, on June 28, 1983, and pursuant to the Commission's ruling in *South Florida Broadcasting Co., Inc.*, 53 RR 2d 1683 (1983), which prohibits the use of certification to remove a pre-existing financial question, Commanche filed a supplemental showing of financial qualifications, which the ALJ accepted. *I.D.*, para. 1. Hispanic has not excepted on this point, and therefore any objection it may have is legally waived. 47 CFR § 1.277(a). In any event, we have reviewed the supplemental financial showing and find based thereon that Commanche is financially qualified.

[3] On October 19, 1983, Hispanic filed a motion for leave to supplement its reply brief which we shall grant.

law, except as modified herein, and affirm the ALJ's ultimate conclusion that grant of Hispanic's application will best serve the public interest, convenience, and necessity.

3. *Air Hazard Issue.* The ALJ granted Hispanic's June 8, 1983 petition for leave to amend reflecting the FAA's formal determination that Hispanic's proposed transmitter site would not be a hazard to air navigation and granted that applicant summary decision on this issue. *Memorandum Opinion and Order*, FCC 83M-2186, released July 8, 1983; *see also I.D.*, paras. 21-27. In its exceptions, Commanche urges that the ALJ should not have accepted Hispanic's FAA amendment because it was filed without good cause. We deny this exception.

4. A brief chronology pertinent to this issue will be useful. At the hearing held March 23, 1983, the ALJ fixed June 1 as the date by which Hispanic should either obtain FAA authorization or seek leave to amend to specify a new transmitter site. Shortly thereafter, Commanche alleged that on the previous October 21, 1982, the FAA had written to Hispanic principal Lawrence Behr confirming a previous telephone conversation during which Mr. Behr requested that the FAA "take no further action on this case until [I] have had a chance to study the feasibility of relocation." Commanche Petition to Enlarge Issues, filed March 28, 1983, Attachment C. In response, Hispanic submitted Mr. Behr's affidavit which stated that, following his FAA conversation, and after conferring with Hispanic's aeronautical consultant, a decision was made to continue to prosecute the original site but "[u]nfortunately that conclusion was not conveyed to the FAA ... and we have now requested that our FAA consultant seek a prompt determination by the FAA." Hispanic Opposition to Petition to Enlarge Issues, filed April 8, 1983, Attachment. By letter of June 1, 1983, Hispanic informed the ALJ that its FAA consultant advised it that a favorable FAA determination was made during the past week and that documentation would shortly be provided. On June 3, a copy of the FAA determination was filed with the ALJ, and, on June 8, a petition for leave to amend to report the FAA determination was filed.

5. As the Board has observed many times, the traditional test of "good cause" for post-designation amendments is outlined in *Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140, 143 (Rev. Bd. 1970), to wit: (1) the amendment was prepared with due diligence; (2) was not required by the voluntary act of the applicant; (3) will not necessitate modification or addition of issues or parties; (4) will not disrupt the orderly conduct of the hearing or necessitate additional hearing; (5) will not unfairly prejudice other parties; and (6) will not cause the applicant to gain a comparative advantage. Because the Hispanic amendment at issue merely supplied the customary FAA certification, and did not involve any substantive change to the applicant's basic engineering proposal, points (3) and (6) are

satisfied. Nor did actual prejudice accrue to Commanche, the competing applicant (point (5)), because no party has a vested interest in the absolute disqualification of a competitor. *See, e.g., Azalea Corp.*, 31 FCC 2d 561, 563 (1971). No disruption to the hearing occurred (point (4)) because Hispanic substantially complied with the June 1 date established by the ALJ for supplying the FAA certification, and no additional hearing was needed.

6. It is true that Hispanic's amendment evincing FAA approval of its original site was, in a literal sense, "voluntary" (point (2)). But, it was not in any practical sense an amendment which altered Hispanic's site designation, and it merely removed any remaining doubt about the acceptability of that site. To disqualify Hispanic "where the amendment . . . remove[s] a disqualifying defect and confers no comparative advantage," *Anax Broadcasting, Inc.*, 87 FCC 2d 483, 489 (1981), would elevate the "involuntariness" element of the "good cause" requirement beyond its intended purposes under the particular facts at hand. Finally, regarding point (1) — due diligence — although it appears that the more than eight-month span between the publication of the *Designation Order*, *supra*, initially specifying the air hazard issue in this proceeding, and the filing of the curative amendment was apparently due to Hispanic's oversight in neglecting to formally inform the FAA of its intention to stand by its original site proposal, no actual prejudice or disruption has thereby resulted; and Hispanic, which acted promptly to trigger FAA action once it acknowledged the need to do so, substantially met the ALJ's timetable for filing the requested information. Under these particular circumstances, as in *Anax Broadcasting*, *supra*, the overriding equities of the case favor acceptance of Hispanic's confirming amendment.[4]

7. *Diversification of Control of the Media of Mass Communications.* Commanche is wholly owned by William R. Rector (25%) and his wife Lyndia Rector (75%). Mr. Rector has a 5% ownership interest in the licensee of Station KCLW(AM), Hamilton, Texas. *I.D.*, para. 5. Lawrence Behr, a 21% stockholder in Hispanic, has a 10% ownership interest in the permittee of a UHF television station at Key West, Florida. *Id.*, paras. 6, 8. The ALJ weighed these ownership interests and concluded that "because of the closer geographical holding in a broadcast facility by

[4] Commanche claims (Br. at 11) that "[t]he instant case is governed in all material respects by the" Board's Decision in *Coastal Bend Family Television, Inc.*, 54 RR 2d 367 (Rev. Bd. 1983). We disagree. That case, in which a lack of good cause was found for the egregiously late filing of a revised financial proposal which was insufficient to resolve the financial issue at bar and which disrupted the orderly conduct of the proceeding, is very dissimilar to the situation here. Hispanic's amendment did not change the underlying proposal, was sufficient to resolve the air hazard issue in question, and has not disrupted the proceeding.

Commanche, *i.e.*, in the State of Texas, a slight demerit ... [should be] imposed" against that applicant. *Id.*, para. 29.

8. In its exceptions, Commanche argues that no demerit should have been imposed because the applicants' attributable ownership interests "offset one another." Commanche Br. at 26. We essentially agree. The attributable interests are not within the community of license or the applicant's proposed service area, and the ownership interests are very small and far less than majority control in each case. Therefore, both interests are of relatively less significance. *See generally Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 394-95 (1965). Although Commanche's attributable interest is closer to the proposed community of license, and is therefore heightened slightly in terms of comparative importance, *see id.*, this condition is counterbalanced because Commanche's interest is in a radio station. Hispanic's interest, however, is in a television station, which is "a more significant media interest *per se*" because "it is in the same type of service that is the subject of this proceeding." *Cleveland Television Corporation*, 91 FCC 2d 1129, 1139 (Rev. Bd. 1982), *review denied*, FCC 83-235, released May 18, 1983, *appeal docketed sub nom. Cleveland Television Corp.* v. *FCC*, No. 83-1659 (D.C. Cir.). In short, we believe that the limited media interests of the applicants are all but mutually-offsetting; the Commission's objective of maximum diffusion of control of the media of mass communications will not be meaningfully advanced by award of a cognizable diversification preference to either applicant. *Cf. Greater Wichita Telecasting, Inc.*, 90 FCC 2d 1046 (Rev. Bd.), *recon. denied*, 92 FCC 2d 780 (Rev. Bd. 1982).

9. *Integration of Ownership and Management.* Lyndia Rector, a 75% owner of Commanche, will devote at least 25 hours per week to her duties as managing director of the proposed station. Her husband, William R. Rector, a 25% owner of Commanche, will devote at least 5 hours per week to proposed station duties. *I.D.*, paras. 5, 10-11. The ALJ, relying on the Board's Decision in *Absolutely Great Radio, Inc.*, 53 RR 2d 97 (Rev. Bd. 1983), credited Commanche with 100% substantial integration, *id.*, paras. 32-33, 35, after attributing to Lyndia Rector the 25% ownership share of her spouse.[5] Hispanic was credited for the full-time (40 hours per week) participation of 24.5% owner Richard Jose Bela as general manager of the proposed station and the part-time (20 hours per week) participation of 24.5% owner Roland Castaneda as sales manager. *Id.*, paras. 15, 38. The ALJ weighed these integration proposals, including the various qualitative enhancement factors such as minority and female integrated owner-

[5] In *Absolutely Great*, the Board held that it would not differentiate for integration purposes between common spousal ownership interests but would assume that the integrated spouse is acting on behalf of the marital entity and, therefore, would attribute one spouse's ownership share to the co-owner spouse. *Id.* at 100-01.

ship and local residence, and concluded that Hispanic should be given a preference. *Id.*, para. 40.

10. In its exceptions, Commanche claims that its proposed 100% integration of a female local resident, albeit on a less than full-time basis, merits a preference over Hispanic's 24.5% full-time plus 24.5% part-time integration proposal. We disagree. To begin with, Commanche is not entitled to the 100% substantial quantitative credit awarded by the ALJ. First, the Commission recently modified the Board's Decision in *Absolutely Great* and held that "ownership interests held by a husband and wife are generally evaluated separately for integration purposes. In cases where both spouses propose to work at the station, but only one spouse is entitled to integration credit for his/her role at the station, the integrated spouse is not credited with his/her spouse's interest. On the other hand, spousal attribution has been permitted in integration cases where the evidence establishes that the fully integrated spouse exercises control over the interest held by the inactive spouse." *Absolutely Great Radio, Inc.*, FCC 83-464, released October 13, 1983, at para. 7. Thus, Commanche is here entitled to only 75% quantitative credit for the 25-hour per week integration proposal of Mrs. Rector. Mr. Rector's 5-hour per week proposal is too insubstantial to warrant any quantitative integration credit in its own right. *See Midwest Broadcasting Company*, 70 FCC 2d 1489, 1494-95 (Rev. Bd. 1979), *review denied*, FCC 79-397, adopted June 21, 1979. And, his 25% ownership share in Commanche may not be attributed to his spouse because there is no record evidence that she will exercise dominion over that interest. *Absolutely Great Radio, supra.* Second, Commanche's 75% quantitative credit is for part-time integration only and not for "substantial" integration as awarded by the ALJ. Substantial integration credit requires a commitment to devote 30 hours per week, at a bare minimum, to the station. *Van Buren Community Service*, 87 FCC 2d 1018, 1021 (Rev. Bd. 1981). Therefore, Mrs. Rector's 25-hour per week proposal is entitled to part-time credit only,[6] and Commanche will thus be awarded 75% part-time quantitative integration credit.

11. We conclude that Hispanic's 24.5% full-time plus 24.5% part-time quantitative integration credit is superior to Commanche's 75% part-time credit and warrants a slight-to-moderate preference. This is so because of the Commission's dominant interest in full-time participation. *Policy Statement, supra*, 1 FCC 2d at 395. *See also Nuance Corp.*, 85 FCC 2d 412, 419 (Rev. Bd. 1981) (moderate preference awarded based on full-time

[6] *Cf. Muncie Broadcasting Corp.*, 89 FCC 2d 138, 153, 163 (ALJ 1981) (applicant Hoosier awarded part-time credit for integration of Ms. Barefoot 25 hours per week), *affirmed*, 89 FCC 2d 123, 133 (Rev. Bd.), *recon. denied*, 89 FCC 2d 1331 (Rev. Bd. 1982), *review denied*, FCC 83-234, 54 RR 2d 42 (1983).

differential of 26% vs. 0% with no part-time credit involved). The enhancement factors present in this case — minority ownership and residence within the service area for Hispanic's Messrs. Bela and Castaneda, and female ownership and local residence for Commanche's Mrs. Rector — fortify both proposals, but cannot be said to so favor Commanche as to overcome Hispanic's clear quantitative advantage. *See Van Buren Community Service, supra,* 87 FCC 2d at 1022. Hispanic merits a slight to moderate integration preference over Commanche.

12. *Summary.* Neither applicant has been awarded a diversification preference and, thus, the only meaningful comparative distinction in this case is Hispanic's slight-to-moderate integration preference over Commanche. We therefore find that a grant of Hispanic's application will best serve the public interest, convenience, and necessity.

13. ACCORDINGLY, IT IS ORDERED, That the motion for leave to file supplement filed October 19, 1983 by Hispanic American Broadcasting of Texas, Inc. IS GRANTED; and

14. IT IS FURTHER ORDERED, That the application of Hispanic American Broadcasting of Texas, Inc. (File No. BPCT-820416KE) for a new commercial television station at Kerrville, Texas IS GRANTED, and the application of Commanche Broadcasting, Inc. (File No. BPCT-820208KE) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

NORMAN B. BLUMENTHAL, *Member, Review Board*

FCC 83D-42

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Commanche Broadcasting, Inc. Kerrville, Texas	BC Docket No. 82-608 File No. BPCT-820208KE
Hispanic American Broadcasting of Texas, Inc. Kerrville, Texas	BC Docket No. 82-610 File No. BPCT-820416KE
For Construction Permit	

APPEARANCES

GENE A. BECHTEL AND HARRY F. COLE, ESQS. (FLOOD, BECHTEL, WARD AND COLE) ON BEHALF OF COMMANCHE BROADCASTING, INC.; WILLIAM M. BARNARD AND MARK VAN BERGH, ESQS. (KENKEL, BARNARD AND EDMUNDSON) ON BEHALF OF HISPANIC AMERICAN BROADCASTING OF TEXAS, INC.; JOSEPH F. HENNESSEY (LOVETT, HENNESSEY, STAMBLER AND SIEBERT, P.C.) ON BEHALF OF TIERRA DEL SOL BROADCASTING CORPORATION; AND BRIAN KILBANE, ESQ., ON BEHALF OF THE CHIEF, BROADCAST BUREAU, FEDERAL COMMUNICATIONS COMMISSION.

Initial Decision of
Administrative Law Judge James F. Tierney

Issued: July 21, 1983; Released: July 29, 1983

Preliminary Statement

1. This proceeding involves the mutually exclusive applications of Commanche Broadcasting, Inc. (Commanche) and Hispanic American Broadcasting of Texas, Inc. (Hispanic) for a construction permit to build and operate a new UHF television station on Channel 35 in Kerrville, Texas.[1] These applications were designated for comparative hearing by the Chief of the Broadcast Bureau in a *Hearing Designation Order*, BC-6122, released September 3, 1982 (47 Fed. Reg. 41625, published Septem-

[1] A third mutually exclusive application for the same facilities was originally designated for hearing, but was dismissed at the request of the applicant, Tierra Del Sol Broadcasting Corporation. *See, Order*, FCC 83M-484, released February 9, 1983.

ber 21, 1982). The issues designated with respect to the two applications were as follows:

1. To determine, with respect to Hispanic, whether there is a reasonable possibility that the tower height and location proposed would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

In addition, Commanche was, in the *Hearing Designation Order*, ordered to submit to the Presiding Judge appropriate certification of its financial qualifications. This certification was filed October 1, 1982, and accepted without opposition. On June 28, 1983, Commanche filed a Petition for Leave to File Supplemental Showing of its financial qualifications pursuant to *Memorandum Opinion and Order* in *South Florida Broadcasting Company, Inc.*, FCC 83-265, released June 2, 1983. Good cause appearing, the Petition IS GRANTED and the information tendered therewith IS ACCEPTED.

2. The *Hearing Designation Order* also provided that, in the event of a grant of Commanche's application, the construction permit would be subject to the following condition:

> During installation of the TV antenna, AM station KERV shall determine operating power by the indirect method. Upon completion of the installation, antenna impedance measurements of the AM antenna shall be made. The results shall be submitted to the Commission, along with a tower sketch of the installation, in an application for the AM station to return to the direct method of power determination. Thereafter, the station may commence *Limited Program Tests.*

3. A prehearing conference was held in Washington, D. C., on December 3, 1982, and the hearing was held on March 23, 1983, also in Washington, D. C. Evidence was offered by the parties with respect to the designated issues, and the record was closed on March 23, 1983 (Tr. 57).[2] At the request of Hispanic, however, the Presiding Judge provided that Hispanic could, on or before June 1, 1983, submit information concerning any disposition of the Federal Aviation Administration (FAA) relative to Hispanic's tower proposal. *Id.* In the alternative, Hispanic would be permitted to submit a counterproposal relative to its tower site. *Id.* The Presiding Judge withheld any ruling on whether any such submission by Hispanic would be accepted (Tr. 31).

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[2] Pages of the record transcript will be cited herein as "Tr. ____"; Commanche's exhibits will be cited as "Commanche Ex. ____, p. ____," and Hispanic's exhibits will be cited as "Hispanic Ex. ____, p. ____".

4. For the reasons set forth hereinafter, this, as an Initial Decision SHALL GRANT the application of Hispanic American Broadcasting of Texas, Inc.

Findings of Fact

The Applicants

Commanche Broadcasting, Inc.

5. Commanche is a corporation of which the President and 25 percent stockholder is William R. Rector, and the Secretary-Treasurer and 75 percent stockholder is Lyndia Rector (Commanche Ex. 1, p. 1; Commanche Ex. 2, p. 1). William R. Rector and Lyndia Rector are husband and wife (Commanche Ex. 1, p. 1). As specifically indicated in Commanche's application, Commanche does not hold any interest in any medium of mass communications, although William R. Rector holds a 5 percent interest in Hamilton Broadcasting, Inc., licensee of Station KCLW(AM), Hamilton, Texas. Also, as indicated in the application, at the time this proceeding was designated for hearing, William Rector held an option to purchase an additional 5 percent of the stock of Hamilton Broadcasting, Inc. However, as stated in an amendment to the application tendered and accepted by the Presiding Judge, that option has since expired without being exercised. Both William and Lyndia Rector are residents of Kerrville who have been active in civic affairs there (Commanche Exs. 1 and 2).

Hispanic American Broadcasting of Texas, Inc.

6. Hispanic has not yet been formed (Hispanic Ex. 1). When incorporated, it will include the following principals:

Name and Residence	*Office*	*Director*	*Percent Ownership of Voting Stock*
Roland Castaneda 11307 Janet Lee San Antonio, Texas	Chairman	Yes	24.5 percent
Raul R. Tapia 5113 Chowan Avenue Alexandria, Virginia	President	Yes	30 percent
Richard Jose Bela 34154 Buck Haven San Antonio, Texas	Vice-President	Yes	24.5 percent
Lawrence Behr 210 West 4th Street Greenville, North Carolina	Vice-President, Secretary/ Treasurer	Yes	21 percent

Messrs. Castaneda, Tapia and Bela are Hispanic-Americans. *Id.* Mr. Behr has never met with Messrs. Castaneda and/or Bela, and he has not

discussed with them their involvement with Hispanic (Commanche Ex. 3, pp. 1-2). Messrs. Bela and Castaneda did not agree to participate in Hispanic until the "latter part of May 1982" (Commanche Ex. 3, p. 2).

7. None of Hispanic's principals reside in Kerrville, and none propose to move to Kerrville[3] (Hispanic Exs. 1, 4, 5).

8. Hispanic does not hold any other interests in any AM, FM or television stations or cable television systems (Hispanic Ex. 2, p. 1). Two principals of Hispanic — Raul R. Tapia and Lawrence Behr — hold various interests in applications for broadcast facilities. Mr. Tapia is 51 percent owner and President and Mr. Behr is 39 percent owner and Vice-President of BT Communications Company, an applicant for low power television stations in the following communities:

Clovis, New Mexico
Snyder, Texas
Taos, New Mexico
Silver City, New Mexico
Tucumcari, New Mexico
Farmington, New Mexico
Bayard, New Mexico

In addition, Mr. Tapia is 31 percent owner and President of an applicant for a new FM station in Santa Fe, New Mexico. Mr. Behr is 100 percent owner of an applicant for a new UHF television station in Key West, Florida; 50 percent owner of an applicant for a new FM station in Christiansted, St. Croix, Virgin Islands; 50 percent owner of an applicant for a new low power television station in Kinston, North Carolina; and 100 percent owner of an applicant for a new UHF television station in Ayden, North Carolina. Pursuant to a settlement agreement, Mr. Behr is to dismiss the Ayden application in return for reimbursement. A settlement agreement has also been executed relative to the Key West application, pursuant to which agreement Mr. Behr's application is to be dismissed and that of his competitor granted (Hispanic Ex. 2, p. 2). While Hispanic's Exhibit 2 indicates that the Key West application had not yet been dismissed as of the date of hearing, official notice, as requested IS GIVEN with respect to the fact that, on May 2, 1983, the Key West settlement was approved which dismissed Mr. Behr's application, and granted the competing application. The competing application was, pursuant to the settlement agreement, amended to reflect Mr. Behr as a

[3] Hispanic states, without elaboration, that Messrs. Castaneda and Bela reside "approximately 35 minutes from Kerrville" (Hispanic Ex. 1, p. 1; Hispanic Ex. 4, p. 1). However, testimony of Lyndia Rector indicated that Kerrville is at least 65 minutes from the residence of Mr. Bela and somewhat more distant from the residence of Mr. Castaneda (Tr. 44-45). Further, according to Mrs. Rector, Mr. Bela's office is approximately eight or nine miles more distant from Kerrville than is his residence (Tr. 45; Commanche Ex. 4).

10 percent stockholder of the permittee. *See, Memorandum Opinion and Order*, FCC 83M-1423, released May 2, 1983.

The "Air Hazard" Issue

9. In response to the "air hazard" issue designated against it, Hispanic offered its Exhibit 6, which consists of a copy of the formal notice it submitted to the FAA with respect to its proposed tower site. Hispanic's Exhibit 6 also includes the admission that no FAA response approving that site has been received.[4]

Integration of Ownership and Management

Commanche Broadcasting, Inc.

10. Lyndia Rector, 75 percent owner of Commanche, has proposed to devote at least 25 hours per week to her duties as Managing Director of the proposed station (Commanche Ex. 1, p. 5). Her position will include determining objectives and policies of the licensee, assuring the implementation and achievement of objectives and standards, and reviewing and critiquing operations. *Id.* Mrs. Rector is a resident of Kerrville (Commanche Ex. 1, p. 2). Since she is not presently employed and since her two children are in school, she has a flexible personal schedule which will permit her to meet her commitment to the proposed station (Commanche Ex. 1, pp. 2, 5). She has personal and familial ties to Kerrville — her grandparents have lived there since the early 1930's, her parents have lived there since the early 1940's, and she was born there (Commanche Ex. 1, p. 1). She has been active in community activities in Kerrville (Commanche Ex. 1, pp. 2-4). She is President of a local Parent Teacher Organization. *Id.* She is President of a local association, which she helped to form, for the education of gifted and talented children. *Id.* She is Co-Chairman of the Special Gifts Division of the local hospital's fund-raising effort. *Id.* She has held leadership positions in the First Methodist Church. *Id.* She is Vice President and Program Chairman of the local Medical Auxiliary, and has led its annual fund-raising project. *Id.* She is active in youth-related fields, including serving as a volunteer nurse at a local school and helping to organize local youth athletic activities. *Id.* In connection with her various community activities and her own personal business affairs, Mrs. Rector has acquired experience with business organization, fund-raising, record-keeping and other organizational matters (Commanche Ex. 1).

11. William Rector, 25 percent stockholder of Commanche, has proposed to devote at least five hours per week to work at the station, where

[4] As noted in paragraph 3, the Presiding Judge provided that Hispanic could, on or before June 1, 1983, submit additional information and/or a counterproposal relative to its tower site.

he will have an office (Commanche Ex. 2, p. 11). His duties there will involve primarily management and consultation relative to technical and production matters, as well as any other matters (including special projects) which may arise. *Id.* He has held a general class amateur radio operator's license for 25 years. *Id.* He is a resident of Kerrville and, like his wife, has been active in community affairs there (Commanche Ex. 2). His family first moved to Kerrville in 1958, and he attended high school there between 1958 and 1960 (Commanche Ex. 2, p. 1). He and his wife returned to Kerrville in 1980 after completion of extensive military service. He is a physician practicing radiology in Kerrville (Commanche Ex. 2, p. 6). He is on the Board of Directors (and a number of committees) of the Kerrville Chamber of Commerce and the Board of Trustees of the Kerrville Independent School District (Commanche Ex. 2, pp. 7-11). He is on the Board of Trustees of the local hospital's building fund drive. *Id.* He is active in the local Rotary Club, the local chapter of the American Cancer Society, and the local youth soccer association. *Id.* He has held leadership positions in the local Methodist Church. *Id.* He has participated in fund-raising activities on behalf of the local hospital and serves as Chairman of its Continuing Education Committee. *Id.* He serves on the Industrial Development Committee of the local Chamber of Commerce, a committee charged with directing the economic growth of the area. *Id.* He has authored a number of medical articles and made frequent public presentations. *Id.* In connection with his various community activities and his own personal business affairs, Dr. Rector has acquired experience in technical matters, business organization, fund-raising, record-keeping and other areas. *Id.* The nature of his present professional and civic commitments is sufficiently flexible to permit him to meet his commitment to the station of five hours per week; his practice allows him at least four months off per year, and in some instances more (Commanche Ex. 2, pp. 11-12).

Hispanic American Broadcasting of Texas, Inc.

12. Hispanic is a corporation yet to be formed. It will be incorporated in Texas with four principals. Roland Castaneda will be its Chairman, a director and 24.5 percent stockholder; Raul R. Tapia will be its President, a director and 30 percent stockholder; Richard Jose Bela will be its Vice-President, a director and 24.5 percent stockholder; and Lawrence Behr will be its Vice-President, Secretary/Treasurer, a director and 21 percent stockholder. Three of Hispanic's principals, Messrs. Castaneda, Tapia and Bela are Hispanic-Americans (Hispanic Ex. 1).

13. Hispanic does not have an ownership interest in any AM, FM or television station or cable television system. Two Hispanic principals, Messrs. Tapia and Behr have interests in applications for various broadcast facilities. Mr. Tapia is a 51 percent owner and President of BT Communications Company, while Mr. Behr is a 39 percent owner and Vice-

President of the same company which has seven applications on file for new low power television stations in Clovis, Taos, Silver City, Tucumcari, Farmington and Bayard, New Mexico, and Snyder, Texas. Mr. Tapia is also a 31 percent owner and President of United Broadcasters of New Mexico, applicant for a new FM station at Santa Fe, New Mexico (Hispanic Ex. 2, p. 1).

14. Mr. Behr is a 100 percent owner of Key West Television Partners, applicant for a new UHF television station at Key West, Florida; 50 percent owner of the B and B Partnership, applicant for a new FM station at Christiansted, St. Croix, Virgin Islands, and for a new low power television station at Kinston, North Carolina; and 100 percent owner of Behrvision of North Carolina, applicant for a new UHF television station at Ayden, North Carolina. Pursuant to pending requests for approval of settlement agreements, Mr. Behr would obtain a 10 percent stock interest in the competing applicant for Key West, Florida, whose application would be granted, and he would dismiss his application for Ayden in return for reimbursement.[5] Mr. Behr is also an engineering consultant, providing consulting services to a number of existing radio and television stations, as well as applicants for new broadcast or communications facilities. He does not have an ownership interest in, or participate in, the management of any of the stations to which he provides consulting services (Hispanic Ex. 2, p. 2).

15. Hispanic proposes to integrate two of its principals, Mr. Roland Castaneda and Mr. Richard Jose Bela, into the management of its station if its application is granted (Hispanic Ex. 3). Mr. Bela will be the station's General Manager, responsible for the overall operation and policy of the station, devoting a minimum of 40 hours per week to his responsibilities (Hispanic Ex. 3). Mr. Castaneda will be the station's Sales Manager, responsible for supervision of the station's sales and advertising policies and operation, devoting a minimum of 20 hours per week to his responsibilities (Hispanic Exs. 3, 5). Messrs. Tapia and Behr will also be involved in developing policy for Hispanic's station. This will not be on a daily basis, involving less than 20 hours per week (Hispanic Ex. 3).

16. Richard Jose Bela, proposed General Manager of Hispanic's station, has lived in the San Antonio area since January 1975 (Hispanic Ex. 4, p. 1). His residence in San Antonio is located within Hispanic's predicted 64 dBu (Grade B) contour (Hispanic Ex. 1). His residence is within

[5] On March 28, 1983, the settlement agreement for Ayden was approved and Mr. Behr's application dismissed, *Memorandum Opinion and Order*, FCC 83M-999, released March 28, 1983; and on May 2, 1983, the settlement agreement for Key West was granted, *Memorandum Opinion and Order*, FCC 83M-1423, released May 2, 1983. Hispanic has filed an amendment to report these recent actions. *See, Order*, FCC 83M-1819, released June 2, 1983, accepting Hispanic's amendment which reports these changes in broadcast interests.

approximately an hour's commuting distance of the proposed station in Kerrville. Mr. Bela stated that his residence is approximately 35 minutes from downtown Kerrville, and that although he doesn't currently anticipate moving to Kerrville, he is prepared to do so if required (Hispanic Ex. 4). In rebuttal testimony at the hearing, Lyndia Rector, 75 percent owner and principal of Commanche, testified that the driving time from Kerrville to San Antonio is an hour and a half (Tr. 40). Later, however, Mrs. Rector testified that she drove from downtown Kerrville to Mr. Bela's residence in one hour, ten minutes and ten seconds in a misting rain at 10:00 a.m. on a Saturday. Her return trip to Kerrville, under sunny and clear weather conditions, took one hour, five minutes. Mrs. Rector testified that while driving the car's cruise control was set at 55 miles per hour or that she drove with the flow of city traffic (Tr. 40, 41, 43, 44, 45). Mrs. Rector further testified that in driving to San Antonio from Kerrville she always takes the same route (Route 10), that she has not attempted to determine the driving time on any other route, that she is not familiar with Mr. Bela's neighborhood, having been there only once and that his neighborhood is residential in nature, with numerous intersecting streets (Tr. 55, 56). While there appears a dispute factually between the adversary witnesses as to the amount of time ordinarily required to and from Kerrville to San Antonio, one hour's travelling time appears reasonable, and it is so found.

17. Mr. Bela is an attorney and a member of the Texas Bar Association and the District of Columbia Bar Association. His primary business is President of AVANTE Properties and Venture, Inc. (AVANTE), which prepares concepts for real estate projects, formulates development plans, and manages limited partnership projects. To accommodate his role as General Manager of Hispanic's station, Mr. Bela would reduce his activity with AVANTE, assuming the position of Chairman of the Board, while Andy Ramirez, AVANTE's Executive Vice-President, would become its President, increasing his role in its day-to-day operation (Hispanic Ex. 4, p. 2).

18. Since 1979, Mr. Bela has been an active member of the Greater San Antonio Chamber of Commerce. For the past five years, he has been a member of the Mexican-American Chamber of Commerce. He is currently a member of the Mexican-American Business and Professional Association. In 1980-1981, Mr. Bela served as counsel to, and was a member of, the Board of Directors of the Market Square Merchants' Association. Mr. Bela is a member of the Bexar County Republican Club. In 1982, he was a Board member of the River Walk Advisory Commission (Hispanic Ex. 4).

19. Mr. Roland Castaneda, who will be Sales Manager of Hispanic's station, has lived in the Kerrville-San Antonio area for nine years. His residence is within Hispanic's predicted 64 dBu (Grade B) contour

(Hispanic Exs. 1, 5). He is currently a principal in the law firm of Castaneda and Mendoza in San Antonio. Mr. Castaneda is also on the San Antonio Board of Realtors, the Greater San Antonio Chamber of Commerce, the Mexican-American Chamber of Commerce, the City of San Antonio-Mexico Task Force, and is a member of the San Antonio Builders' Association. Mr. Castaneda believes he can devote a minimum of 20 hours per week to Hispanic's station within his current schedule without difficulty. He is, however, prepared to scale back his law practice and other activities sufficiently to be able to meet his commitment to the station (Hispanic Ex. 5).

20. Hispanic has submitted to the FAA Form 7460-1, Notice of Proposed Construction or Alteration, dated June 4, 1982, for its proposed antenna tower. Hispanic has not yet received the FAA's advisory response concerning its proposed antenna tower (Hispanic Ex. 6). At the hearing, counsel for Hispanic stated that "the problem seems to be that there is a small airport in the neighborhood of our [Hispanic's] proposed tower that has objected to this, and the FAA has simply not made a determination yet" (Tr. 30). Hispanic agreed and the Presiding Judge ordered that by June 1, 1983, Hispanic will either have received an FAA determination in its favor or will amend its application to meet the air hazard issue (Tr. 31, 57).

Ultimate Findings and Conclusions

21. Two principal issues are involved in this proceeding. The first is the air hazard issue specified against Hispanic. Because Hispanic has had until June 1, 1983, in which to either obtain a determination of no hazard from the FAA or amend its application to meet the issue, the issue would now be ripe for determination. By letter dated June 3, 1983, Hispanic has supplied formal FAA certification. In this regard, Commanche, by a pleading styled "Comments," filed those "Comments" on June 6, 1983. The second or remaining issue is grounded in the criteria set forth in the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) and are specifically addressed to the diversification of control of the mass media and the best practicable service to the public.

22. Briefly, Commanche's "Comments" would have it that besides procedural deficiencies, Hispanic's letter notice of contemplated FAA approval and presumably its letter of June 3, 1983, forwarding a copy of FAA's approval fall well short of the substantive standards applicable to post-designation amendments under Rule 73.3522, citing *Erwin O'Conner*, 22 FCC 2d 140, 143 (Rev. Bd. 1970) and *Shoblom Broadcasting, Inc.*, 53 RR 2d 1203, 1204 (Rev. Bd. 1983). These shortcomings, Commanche suggests, would be lack of due diligence, because of Hispanic's conduct *vis-a-vis* the FAA concerns, Hispanic's act was purely voluntary, disruption of the proceeding, prejudice to the other parties and

comparative advantage were Hispanic now permitted to update its earlier deficiency respecting the designated air hazard issue.

23. Without doubt, Hispanic's latest submissions on the air hazard matter are surely post-designation, they are not, however, without material meaning and consequence to a fair and reasonable disposition of the given issues here. Though its pace in proving early resolution of its concerns with the FAA can hardly be termed lightning-like, on the other hand neither can they be ignored nor overlooked in the resolution of this contest. This would be the case even with Hispanic's strange conduct with the FAA matter, earlier alluded to in *Memorandum Opinion and Order*, FCC 83M-1436, released May 3, 1983, addressed to Commanche's Petition to Enlarge Issues.

24. In addition to the specific permission granted Hispanic during the hearing (Tr. 57) to get about resolving its arrangements with the FAA concerning the air hazard aspects of its proposed transmitter, there is present in these proceedings the abiding thesis that an applicant has no vested interest in the disqualification of a competitor. In its mandate to preserve, protect and encourage the interests of the public, it is more important that this agency be free to select from among as many qualified candidates as possible to find and determine the one who would best serve these interests. (*Cf.*, *Azalea Corporation*, 31 FCC 2d 561, 563 (1971).)

25. In spite of earlier misgivings underlying Hispanic's seeming Fabian-like efforts to address and meet the obstacle of FAA approval of the "air hazard" problem, it has now done so, however belatedly. By letter of June 1, 1983, Hispanic advises that its FAA Consultant has learned of FAA's determination of no air hazard, but that appropriate documentation has not yet been prepared and forwarded by FAA. By letter of June 3, 1983, Hispanic advised that such documentation was now at hand and attached same. It then promised to get about preparing an appropriate amendment to its application together with a Motion for Summary Decision to formally resolve the air hazard issue. These letters prompted Commanche to file a pleading styled "Comments" in which Commanche describes that these letters are "consistent with [Hispanic's] lackluster performance heretofore . . . and believes that a rule of reasonableness should govern proceedings such as this, there comes a time when an applicant must be told to prove its case or lose it" and that among other reasons standard notions of administrative finality "demand that a final decision be reached"; as such Hispanic, despite substantial lieniency, has failed to meet its burden under the FAA citing in support *Shoblom Broadcasting, Inc.*, 53 RR 2d 1203, 1204 (Rev. Bd. 1983). Though surely Hispanic's pace and tactic in resolving the air hazard problem have been somewhat less than the acme of dedicated proficiency, nonetheless, it has adequately responded to June 1, 1983, date accorded it during hearing.

Thus, inasmuch as the interest of the public in these matters is paramount, no inordinate harm or prejudice is visited upon Commanche in permitting its opponent to seek and achieve basic qualification. There may be times where rigid orthodoxy in interlocutory matters and pleadings relating thereto must be imposed, but this is not such an occasion.

26. The Hispanic Motion for Summary Decision and related proposed amendment have been addressed and disposed of separately, but, for reasons of coherence in the ultimate disposition here, will also be incorporated by reference in the reasons in support of that disposition. *See, Memorandum Opinion and Order,* FCC 83M-2186, released, July 8, 1983. The proposed findings and proposed conclusions of both parties filed with their respective Motion and Countermotion for Summary Decision are also acknowledged and have received appropriate consideration.

27. Having found in *Memorandum Opinion and Order, supra,* Hispanic basically qualified, there remains for resolution the customary comparative considerations between the parties as governed by the *Policy Statement on Comparative Broadcast Hearings,* 1 FCC 2d 393 (1965) (*Policy Statement*) and prevailing precedent thereunder. That *Policy Statement* has two primary or principal objections (a) maximum diffusion of control of the media of mass communications, and (b) best practicable service to the public. The comparative strengths or weaknesses of the diversification and integration aspects of each applicant are the elements on which comparative choice is bottomed.

Diversification

28. Neither Commanche nor Hispanic has any other direct broadcast interests. William Rector, a 25 percent stockholder of Commanche, owns 5 percent of the stock of Hamilton Broadcasting, Inc., licensee of Station KCLW(AM), Hamilton, Texas, which interest is attributable to Commanche. While Rector's interest may fall "far short of 'complete ownership and control,' " as Commanche would have it, citing 1 FCC 2d at 395, and may be of "minimal consequence," comparatively, it is, of course, of some consequence.

29. Hispanic's 21 percent stockholder, Lawrence Behr, owns a 10 percent interest in the permittee of a new UHF television station in Key West, Florida. This holding appears "hundreds of miles" from Kerrville, Texas. (*Cf., Coastal Bend Family Television, Inc.*, FCC 83R-46, released, June 24, 1983) while Rector's (of Commanche) holding in KCLW is in the State of Texas. In a strange application of reasoning, Commanche would have it that Hispanic's 21 percent stockholder (Behr), holding 10 percent in the Florida Station, and Dr. Rector, 25 percent stockholder of Commanche, having but 5 percent in a Texas station, comparatively, the adverse impact on Hispanic "must be deemed to be greater than the impact of Dr. Rector's interest on Commanche's qualifications." If

anything, because of closer proximity of Rector's holding in Texas to the community of Kerrville, Texas, the reverse would be true. While one must — in comparative contests — render analysis, at times, in depth and detail to discern real nuances of qualifications between contestants, here, weighing the diversification differences on any reasonable scale would suggest whatever those differences between the parties here, because of the closer geographical holding in a broadcast facility by Commanche, i.e., in the State of Texas, a slight demerit can be and is imposed. This notwithstanding Commanche's request not to ignore the substantial involvement of two of Hispanic's stockholders holding 51 percent of Hispanic in ten other pending broadcast applications. These, as applications, traditionally have no adverse impact on diversification factors, and are simply treated as reflecting no proprietary media interests.

Integration of Ownership and Management

30. Historically, this area of comparison has been the underpinning of that other primary objective of the *Policy Statement*, the best practicable service to the public, and is divided into subconcepts, quantitative and qualitative attributes of ownership/management of the contesting applicants. Commanche, for its part, is wholly-owned by the Rectors, "a husband-and-wife team." As noted by Commanche, where an applicant is thus owned by husband and wife and where either the husband or wife is proposed to be integrated into day-to-day station management, the integrated individual is to be credited with the ownership of both husband and wife. Commanche on this point may accurately reflect recent emphasis of this notion or policy in *Absolutely Great Radio, Inc.*, 53 RR 2d 97 (Rev. Bd. 1983). But, as later described, the integrated Commanche principal will be part-time, a situation perhaps this side of "day-to-day" station management. Nevertheless, the husband-wife attribute will be considered.

31. Thus, Lyndia Rector who proposes to be employed in the active management of the proposed Commanche station a minimum of 25 hours per week, an amount less than full time, based on 40 hours per week — would be entitled to an integrated credit derivative through the 100 percent husband-wife ownership, not as Commanche would have it "50 percent of full time" in its "raw arithmetical calculation," rather a part-time, but substantial, integration (25 hours per week) in a derivative 100 percent ownership (husband-wife). Hispanic, on the other hand, would challenge the attribution of 100 percent husband-wife ownership saying "there is no evidence that the Rectors have joint or common ownership of their respective interests in Commanche," citing *Absolutely Great Radio, Inc., supra*. Further, Hispanic argues, the Rectors cannot have a common financial interest in Commanche since their 75 percent and 25 percent ownership interests in a community property state (which Texas is)

"necessarily means that their interests in Commanche result from separate, non-marital financial resources used to acquire their interests, rather than the resources of the marital community (which would have required a 50 percent ownership interest for each)."

32. In *Absolutely Great Radio, Inc., supra,* at 101, the Review Board observed, "Nor need married co-applicants make evidentiary showings that one is spouse-like or mouse-like. We will assume that the integrated spouse is acting on behalf of the marital entity, i.e., a common party-in-interest, and will attribute one spouse's ownership share to the co-owner [footnote omitted]." In that and other language in *Absolutely Great Radio, Inc., supra,* it seems that mathematical thesis of ownership percentages of husband-wife situations are not the compelling or critical points of determination rather and simply where, as here, the marital community owns 100 percent ownership, one or the other of that community will be assigned that total ownership. Recognizing that, does not mean, however, that 100 percent husband-wife ownership equates with the notion of *full-time participation* where, as here, one spouse, Mrs. Rector, proposes only *part-time participation* in the management and operation of the proposed station. Her husband's proposed five hours' weekly participation is of no measurable comparative significance.

33. What quantitative integration then is to be credited to Mrs. Rector? As the *Policy Statement* notes, "[t]o the extent that the time spent moves away from full time, the credit given will drop *sharply*, and no credit will be given to the participation of any person who will not devote to the station substantial amounts of time on a daily basis." (*Policy Statement* at 395.) (Emphasis Added.) "One hundred percent part-time" cannot, of course, be transformed or translated into what seems otherwise an amorphous notion, quasi-full-time. Thus, "50 percent" *full-time* integration for Mrs. Rector cannot be credited but something much less; a matter to be measured by prevailing precedent or other traditional factors of comparative consideration. In *Van Buren Community Service, infra,* two 20 percent stockholders, each committed to 30 hours weekly, were accorded 40 percent *substantial* integration; an 18 percent stockholder proposing at least 20 hours was credited with 18 percent "part-time integration." There, no party proposed greater than 10 percent full-time participation. On balance of the various factors here, Mrs. Rector can and will be accorded 100 percent *substantial* integration for her proposed 25 hours weekly, even though her participation would be shy of the 30 hours in that case.

34. Bearing the title of Managing Director, the undisputed testimony is that her position will encompass her role not only as Commanche's Secretary/Treasurer, but also her duties will include determining objectives and policies of the company. Whether those duties are simple

corporate, not station-operated oriented, as Hispanic insists, at first blush may not seem entirely clear. Hispanic would attribute little integration credit to Mrs. Rector, saying that her proposed position as Managing Director would be nothing more than "general supervision required of all Commission licensees, which is not meaningful ownership participation required for integration credit under the *Policy Statement.*" That "chairing staff meetings and reviewing hiring and firing of personnel, have been held not to warrant integration credit." Commanche rejects this notion saying that Mrs. Rector's involvement in the proposed station is "in its entirety, management-level," citing *United Broadcasting Company, Inc.*, FCC 82D-73, released November 9, 1982, where a colleague gave full integration credit for position of "managing director" with responsibilities equivalent to those of Mrs. Rector. Indeed, chairing all staff meetings and supervising, that is deciding, hiring and firing policies, surely are management-level responsibilities.

35. Commanche's argument concerning the true dimension of Mrs. Rector's proposed management position seems the better of the propositions, and she will be accorded 100 percent substantial integration in management, albeit less than the higher quality accorded *full time.* Mrs. Rector, as a female, would enhance qualitatively that integration, not a "substantial" or "significant" enhancement, but at least moderate or slight in reach. Her local residence and civic activities would also further enhance her integration credit, but these too must be accorded reduced impact because of her part-time participation. "[T]o the degree that the proposed participation is less than full time, the value of the residence or experience is diminished." *Charles Vanda,* 4 FCC 2d 655, 662 (Rev. Bd. 1966).

36. Hispanic's diversification status has been considered earlier and need not be repeated. Its integration of ownership in management posture *vis-a-vis* Commanche seems to be the crucible for the test of comparative choice. At the outset, Hispanic proposes to integrate Richard Jose Bela, a 24.5 percent stockholder, as the full time General Manager. Mr. Bela also is a Hispanic-American who, although not a resident of Kerrville, the proposed community of license, does reside within the proposed service area and has lived in the San Antonio area since 1975. He has also been sufficiently active in civic affairs in his area of residence, a matter to be recognized as of some importance or enhancement.

37. Roland Castaneda, a 24.5 percent stockholder of Hispanic, is proposed as the Sales Manager of its station. Castaneda is also a Hispanic-American and "will devote a minimum of 20 hours per week to his duties as Sales Manager," a part-time participation. His residence, also while not in the proposed community of license, is in the proposed service area. He has lived in his area of residence for nine years and may be credited with

some enhancement recognition for civic activities in that area. Hispanic's two other stockholders, Raul Tapia, 30 percent, a Hispanic-American, and Lawrence Behr, 21 percent, "will also be involved in developing policy for the station" but for less than 20 hours per week.

38. In sum then, Hispanic can be credited with 24.5 percent full-time integration for Bela, and Castaneda (20 hours) will be credited with 24.5 percent part-time integration. Both Bela and Castaneda, as Hispanic-Americans, can be assigned enhancement as minorities, substantial in the case of Bela and something less for part-time Castaneda. Their residences in the proposed service area and civic attributes provide a further slight enhancement but along the same lines as in *Charles Vanda, supra,* of diminished value as affected by Castaneda's part-time integration.

39. The reasoning process appears now to permit the beginnings of a rational choice between the parties, centered almost entirely on the criteria of integration. For, while a 40-hour per week commitment is necessary for full-time integration, *Peoples Broadcasting Corporation,* FCC 83R-33, released May 3, 1983 (Rev. Bd.), a 30-hour week is considered substantial, *Radio Greenbrier, Inc.,* 80 FCC 2d 107 (Rev. Bd. 1980); 20 hours per week is considered but part-time participation warranting only slight credit. As participation moves away from full time, the quantitative credit for such participation decreases more sharply than proportionately with a corresponding decrease in the number of hours of participation per week. *Van Buren Community Service Broadcasters, Inc.,* 87 FCC 2d 1018, fn. p. 1022 (Rev. Bd. 1981). In that footnote, the reviewing authority renewed its disdain for beguiling mathematical method in assessing full-time integration. Thus, a part-time proposal of say 20-30 hours is worth significantly less credit than half a full-time proposal of 40 hours. (*Cf.,* *The New Continental Broadcasting Company,* 88 FCC 2d 830 (Rev. Bd. 1981).

40. The *residuum* of the foregoing analysis of the respective comparative factors affecting the parties is that Hispanic warrants 24.5 percent full-time integration credit for Bela; 24.5 percent part-time integration, thus a slight credit, for Castaneda, with substantial enhancement as a minority person for Bela and a recognizable but slight enhancement for part-time Castaneda, together with enhancement for service area residence for the two persons in similar proportion. Commanche's Mrs. Rector, whatever her stock ownership attribution, even at 100 percent, because of her part-time participation, albeit of substantial dimension, would be significantly less than half of the full-time proposal of Bela, notwithstanding his stock ownership of 24.5 percent. This can be distinguished with the resolution in *Van Buren, supra,* where 40 percent substantial and 18 percent part-time "on balance" merited a slight preference over a 10 percent full-time integration. Here the 24.5 percent

full-time integration is more than double that in *Van Buren*, and full time is worth more than a proposal of 20-30 hours. Mrs. Rector's credit rises to the level of 100 percent substantial integration, but this would not turn the tide in her favor. Adding the slight integration credit given Castaneda for his part-time participation to the full-time participation of Bela, Hispanic quantitatively must win the day. The enhancement of Bela plus the slight enhancement of Castaneda as minority persons clearly outweigh the slight enhancement accorded Mrs. Rector as a female. Her local residence and civic activities, although in the proposed community, and clearly more identifiable with the community of license, Kerrville, than her opponent, could not tip the scales in her favor principally for the reasons of quantitative superiority of Hispanic. When the slight demerit for diversification purposes is added to the comparative deficiencies of Commanche, the conclusion favoring Hispanic is more compelling. *Horne Industries, Inc., et al*, FCC 83R-49, released July 13, 1983 (Rev. Bd.). "Female ownership is also considered an enhancement factor but is entitled to lesser weight than minority ownership." Brief for FCC in *West Michigan Broadcasting* (*Waters*), filed April 29, 1983, at n. 2. Court of Appeals (D. C. Circuit) at p. 10.

41. Obviously, the much discussed and debated matter concerning Hispanic's notion of a Kerrville-San Antonio area or community makes little sense. It seems, if only in geographical terms, Kerrville is clearly separate and distinct from the community or area of San Antonio; in any event, this matter hardly has meaningful decisional significance, even if one were to accept the argument that the travel time between Kerrville and San Antonio is approximately one hour. The Rectors' local residence and activities which are clearly of a higher order than their opponents have been fully recognized and considered; these would not affect the result reason compels.

Accordingly, for the foregoing reasons and the public interest so warranting, the application for Hispanic American Broadcasting of Texas, Inc., for a new television station on Channel 35 at Kerrville, Texas, may be AND IS HEREBY GRANTED; that being so, the application of Commanche Broadcasting, Inc., for these same facilities must be AND IS HEREBY DENIED.[6]

IT IS SO ORDERED.

FEDERAL COMMUNICATIONS COMMISSION

JAMES F. TIERNEY, *Administrative Law Judge*

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[6] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, the Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Common Carrier, Rate or Tariff, Unlawful
Divestiture
Tariff, Investigation
Tariff, Revision of
Telephone Exchange

Certain tariff material submitted under Exchange Carrier Assn. (ECA) transmittal 1 unlawful. ECA ordered to file revised tariff material in compliance with Order.
—*Investigation of Access/Divestiture Tariffs*
CC Docket No. 83-1145

FCC 84-51

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Investigation of Access and	CC Docket No. 83-1145
Divestiture Related Tariffs	Phase I

MEMORANDUM OPINION AND ORDER

Adopted: February 16, 1984; Released: February 17, 1984

BY THE COMMISSION: *COMMISSIONER DAWSON ISSUING A SEPARATE STATEMENT; COMMISSIONER PATRICK NOT PARTICIPATING.

I. Background

1. In our Access Charge Orders, *MTS/WATS Market Structure, C.C. Docket No. 78-72, Phase I, Third Report and Order*, 93 FCC 2d 241 (1983), (Access Charge Order), *modified on reconsideration* FCC 83-356, released August 22, 1983 (*First Reconsideration Order*) we established a single uniform mechanism through which local telephone exchange companies will recover the costs of providing access services needed to complete interstate and foreign telecommunications. The access charge plan reflected our efforts to adapt existing compensation mechanisms to rapidly changing telecommunications technologies and market dynamics. We sought to allow full and fair competition in interexchange services,

and the benefits such competition would provide to consumers, while achieving a proper balance among four primary policy objectives: (1) elimination of unreasonable discrimination and undue preferences among rates for interstate services; (2) efficient use of the local network; (3) prevention of uneconomic bypass; and (4) preservation of universal service.

2. The Access Charge Plan as thus developed had these major features:

* All charges for interstate and foreign access are to be assessed by annual tariffs filed with this Commission, replacing the variety of existing compensation mechanisms.

* An Exchange Carrier Association (ECA) was established to prepare and file tariffs on behalf of carriers wishing to join it and to collect and distribute all Carrier Common Line rate element revenues.

* End user charges for 1984 were to be $2 for residential lines and up to $6 for business lines. These charges would be added to local exchange rates (unless a lifeline waiver were granted in order to preserve universal service) and offset by lower long distance rates.

* Carrier rate elements are to be based on costs computed and allocated as set out in the rules, and generally assessed per access minute of use.

* To reasonably approximate carrier charges for "leakage" (*i.e.*, use of the local exchange for interstate communication without payment of a corresponding usage charge) a surcharge of $25 per Special Access line termination is applied pending development of techniques to measure and charge for actual usage.

* For Special Access (basically local private lines used for access), carriers were to establish appropriate subclassifications, with charges designed to produce the associated revenue requirement and reflect cost differences in a manner that complies with Commission rules and decisions.

3. Tariffs implementing the access charge plan were directed to be filed on at least 90 days' notice to be effective January 1, 1984. Concurrently, the American Telephone and Telegraph Company (AT&T) and the local Bell Operating Companies (BOCs) also filed interstate tariffs reflecting the access tariffs and implementing the massive divestiture of AT&T pursuant to the Modification of Final Judgment (MFJ) adopting a consent agreement with the U.S. Department of Justice.[1] Altogether, by October 3, 1983, about 43,000 tariff pages (including 76 separate access tariffs) and 160,000 pages of associated support material were filed in response to the access charge plan and divestiture.

4. This Commission recognized the important benefits of implementing access tariffs to coincide with the January 1 date for divestiture. However, based on its initial review of the filed material, it was clear that the tariffs presented numerous substantial questions of lawfulness, notably in areas where the Access Charge Orders are silent or provide

[1] United States v. American Telephone and Telegraph Company, 552 F.Supp. 131 (D.D.C. 1982), *aff'd sub. nom.* Maryland v. United States, 103 S.Ct. 1240 (1983).

only general guidelines. For example, the tariffs propose substantial ordering charges and other non-recurring charges (an area we pledged to scrutinize carefully) and widely varying Special Access charges. Approximately 50 local carriers also had not filed or joined in access tariffs. AT&T's interstate tariffs reflecting access and implementing divestiture also presented significant issues of lawfulness. Altogether, the filed tariffs fundamentally revised the rates and terms for virtually every interstate telecommunications service. Moreover, divestiture could proceed even if access tariffs were delayed. As a result, we concluded that the benefits of early implementation were outweighed by the need for careful review and meaningful opportunity for public comment.

5. Accordingly, the Commission set all the access and divestiture related tariffs for investigation. *Investigation of Access and Divestiture Related Tariffs*, CC Docket No. 83-1145, FCC No. 83-470, released October 19, 1983. (*Investigation Order*). We also judged that a three month suspension period would enable us to resolve at least the major issues necessary to achieve workable tariffs. We therefore suspended all the tariffs until April 3, 1984 and established three separate pleadings cycles for public comments and carriers' replies. In this, Phase I of the investigation, concerning the access tariffs filed by local telephone exchange companies (telcos), fifty-five sets of comments were filed raising numerous issues concerning the ECA and other access tariffs. The commenters are listed in Appendix B.

6. Two related matters also affect our evaluation of the filed tariffs. The National Association of Broadcasters (NAB) on December 23, 1983, requested that the Commission separate the issues in this investigation and establish additional procedures; specifically it urged that carriers be required to file "baseline tariffs" containing only those minimal changes necessary to comply with Commission orders, leaving other matters to separate, additional transmittals.

7. Most importantly, in our decision on further reconsideration of the Access Charge Plan, (*Second Reconsideration Order*, FCC 84-36, released February 15, 1984, we adopted a number of important changes to our rules which necessitate changes in the filed tariffs.

* We decided to defer end user charges for residential and single-line business customers until June 1, 1985. This deferral may be expected to require an increase in the carrier portion of common line charges.[2]

[2] The delay will enable the Commission to conduct supplemental proceedings to devise an exemption for persons who cannot afford to pay any end user charge, reevaluate the transition plan for end user charges, and explore alternative mechanisms to assist customers of small telephone companies. To assist us in making those decisions, we decided to conduct further studies of bypass and the transition plan's effects on universal service. Since we determined that reevaluation of the transition plan for end user charges was necessary, the existing Sections 69.202-69.204 are to be removed from the Rules and

* We revised the rates for non-premium access charged to OCCs. The old rates were initially to be priced on a per minute basis at 65% of the premium rate for some elements and the same rate for others. The premium would be phased out on a nationwide average basis as equal access was achieved. The revised rules provide that unequal access is to be priced on a per line, per month basis at 45% of the level of premium access. This monthly rate is based on 9000 minutes, which is typical of OCC usage. This charge will increase yearly based on changes in the Consumer Price Index. The rate differential will end when equal access is offered by individual companies to all OCCs.

* We clarified that FX customers will pay access rates at the open end on a per minute basis, at the level charged to OCCs, (*i.e.*, per minute rate computed by dividing the monthly rate for equivalent access by 9000 minutes). Where AT&T obtains switched access to provide FX service it will pay the same rate.

* Because expected changes in treatment of the closed end of WATS have not been made for purposes of separations, we modified the access rules to conform. WATS access lines will therefore not be treated as Special Access lines, but in the same manner as other common lines. Minutes of use at the closed end of interstate WATS lines will be counted in calculating and assessing the carrier common line charge, the business end user charge will apply to all WATS access lines, and no special access surcharge will be assessed for the WATS closed end.

* We clarified and modified the application of the $25 Special Access Surcharge to more closely target private lines that "leak." Private line customers certifying that their private line is not interconnected with the local exchange through a PBX or other device capable of switching traffic to or from the local exchange will be exempt from the special access surcharge.

* We clarified that access charges are not applicable to carriers in the Public Mobile Service (Part 22 of the Commission's Rules).

* We reaffirmed our decision to establish a gradual phase-in of end user charges for Centrex-Co users. Accordingly, the end user charge for "embedded" Centrex lines in place or on order by July 27, 1983, will be limited to $2.00 for 1984-85. Only Centrex lines not in place or on order by that date will be charged the full multiline business rate, which could be up to $6.00.

* Each of these changes in the Access Charge Plan and Rules must be given effect by revisions in the pending access tariffs.

II. Discussion

8. As we explained in the *Investigation Order*, our goal is to resolve at least the major issues necessary to assure that generally reasonable, workable access tariffs are in place from the outset. These tariffs substantially transform the relationship among telecommunications customers, carriers and equipment suppliers. Significant unreasonable or unjust provisions could have profound effects on the telecommunications industry and on the public. At the same time because of the novelty, breadth, and complexity of the issues raised by these tariffs, it may not be possible to resolve all issues immediately. Actual operational experience

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a new Section 69.202, which describes the end user charges for 1984-85, will be substituted. Sections 69.203 and 69.204 are reserved for the new transition rules that we will be adopting in supplemental proceedings.

and the rapid changes in technology and market forces may also reveal new issues over time.

9. Our approach in seeking to resolve the major issues in this investigation has been to direct our attention most closely to the ECA tariff. There were several reasons for this. Of the 1540 local telephone exchange carriers in the U.S., 1328 joined the ECA for all rates and regulations as issuing carriers of the ECA access tariff. Many others, including 10 of the BOCs, participated in ECA revenue pools for one or more groups of rate elements. The ECA tariff is also the only complete self-contained access tariff — all local companies participate in the ECA to recover carrier common line revenues, as required by our rules. This element is by far the largest carrier rate element. Moreover, the ECA tariff and accompanying support material were prepared by the Central Service Organization (CSO), which is now maintained jointly by the BOCs, and at that time was a part of the not-yet-divested AT&T. As a result, perhaps, of this common parentage, the ECA tariff was the model for and is identical in format and structure to the tariffs of the BOCs, who provide service to over 80% of all telephone customers; the BOC tariff regulations and provisions also are largely identical to those in the ECA tariff. The other, independent telcos employ provisions which depart somewhat more widely from the pattern of the ECA tariff, but those tariffs also are most often either identical or at least similar to the ECA's. An evaluation of the ECA tariff, in short, will constitute an evaluation of the great majority of the terms and conditions of virtually all access tariffs.

10. The filed tariffs do differ from the ECA tariff, and among themselves, in one very important respect: the rates. These differences are often substantial. Rates for identical special access elements, for example, vary by factors as great as a hundred times or more. We cannot with complete reliability judge the reasonableness of one carrier's rates from those of another. Costs of local exchange companies may differ substantially even for identical facilities or services because of the longer distances and lower relative demand factors in less populated or less accessible areas, different salary schedules in different parts of the country, variations in the vintage and types of equipment, and other factors. Nevertheless, the ECA's rates and rate development do provide a useful starting point for considering all the proposed access rates. The ECA averages costs for many different telcos subject to a wide range of cost factors, including for some rate elements both BOCs and large and small independents. The methodology used by the ECA is both similar to that employed in other filings (particularly the BOCs) and generally more completely described. Our conclusions on the validity of that methodology and its correspondence with the access rules, the Communications Act, and the policies we have developed to implement it will apply in large part

to the other filings. Such conclusions will be useful benchmarks for analysis of all access tariff rates.

11. The analysis of the ECA rate methodology and the actual rates themselves is presented in the next section. This is followed by a corresponding analysis of the rates proposed in the other access tariffs, a description of our evaluation of the tariff provisions and regulations, a discussion of miscellaneous issues, and specific requirements for the refiling of tariffs to correct the errors and deficiencies we have identified. In the appendices, the bulk of this order, we provide further information on the rates and a section-by-section analysis of the ECA tariff with specific directions for needed changes in tariff language and other further action by the local telcos.

III. ECA Rates

12. The filed ECA rates were developed based on the *Access Charge* and *First Reconsideration Orders.* Thus changes in some of the filed rates will be necessary to implement and reflect the *Second Reconsideration Order.* With the deferral of the residential and single line business end user charges, the carrier common line rate element will presumably increase to recover this shortfall. The flat monthly rate for ENFIA-type access for OCCs may require adjustments in other carrier rate elements. Other rates, such as Special Access, may be indirectly affected because of shifts in demand caused by other rate changes and the revised application of Special Access Surcharges. We have also concluded that rate structure changes are needed for some service categories, notably Special Access. We expect, accordingly, that many of the pending rates filed in the ECA and other tariffs will require revision.

13. We can, nevertheless, review and evaluate the proposed cost and rate development, including many individual rates which are not likely to change substantially, in order to determine the reasonableness of the methodology and support information used in the pending filing. To the extent the methodology is reasonable and information filed in support adequate, only incremental adjustments to the pending tariffs and filings may be necessary under the *Second Reconsideration Order.* On the other hand, should we identify problems with the pending filings which require changes in either the basic methodology or the justification and support, the filing carriers will be able to make needed corrections at the same time that they perform the analysis and revisions occasioned by the *Second Reconsideration Order.* Our immediate review and resolution of fundamental cost and rate development issues should permit reasonable access rates to become effective at the earliest possible date.

14. Although we have mandated some important aspects of access cost identification and rate development in Part 69 of our Rules, the process is nonetheless exceedingly complex, requiring massive amounts

of data, complex procedures to allocate raw expense and investment figures to specific cost accounts, the separation of costs between intrastate and interstate categories, the distribution of interstate costs among particular services in an equitable manner, and the development of demand estimates. In the present case, this process is complicated by a further order of magnitude, because it involves all separated interstate costs, all local telcos, entirely new procedures replacing the settlement and division of revenues processes, a wholly restructured industry, thousands of individual rates (many of them for restructured services filed in federal tariffs for the first time) and 76 separate filings. In the specific case of the ECA tariff, each rate is based on costs aggregated from over 1300 different local telcos.

15. Each of these tariffs must carry out the carrier's overall obligations under the Communications Act and implement the specific requirements of our rules. Under Section 201(b) and 202(a) of the Act, 47 U.S.C. §§ 201(a), 202(b), all charges must be just, reasonable, and not unreasonably discriminatory or preferential. The Part 69 Access Rules seek to accomplish this by requiring that costs as derived from Separations Manual accounts be distributed to specific, identified rate elements and categories. These rules do not, however, address the issue of the reasonableness of the amounts claimed by telcos as overall system or separated interstate costs. Section 61.38 of our Rules specifies the material which must be submitted in support and justification of new and changed tariff material, including economic data and information. In the case of a proposed rate increase, the data must be in appropriate form to serve as the carrier's direct case in the event it is set for hearing. The burden of proof at any such hearing involving a proposed rate increase is upon the carrier. 47 U.S.C. § 204(a).

A. Development of the Overall Revenue Requirement in the ECA Tariff Filing

16. The starting point for developing or reviewing a rate filing is establishing an overall revenue requirement. A carrier is entitled to charge rates which recover allowable expenses and a reasonable return on the investment in property used and useful for service to the public. This amount is the revenue requirement. For Switched and Special Access services, we have allowed telcos a revenue requirement based on a 12.75% return, equal to that allowed AT&T for its interstate and foreign operations since 1981. This is higher than the achieved return of AT&T while it was operating in partnership with the BOCs and the independent telcos before divestiture.

17. Because the ECA itself is not a carrier, its tariff is based on cost information submitted to it by local telcos with respect to the ECA rate element pools in which each participates. To develop these costs the ECA

directed data requests to the telcos, separately tailoring requests for BOCs, cost schedule independents, and average schedule independents. The major part of the costs thus developed are taken from the BOCs' reports. For example, of overall common line rate elements, $8.53 billion of the claimed $10.8 billion revenue requirement, or 79%, was attributable to the BOCs. Of the remainder, $1.93 billion, (18%) was for cost schedule independents, and $347 million (3%) for average schedule independents. Possibly because the ECA tariff was prepared by the Central Services Organization (CSO) of the BOCs, the BOC revenue requirement figures were accepted by the ECA. The ECA simply used the overall interstate revenue requirements claimed by each of the BOCs in their individual filings for its development of the ECA rates.[3] To evaluate the claimed ECA revenue requirement, we must therefore examine the revenue requirements claimed by each BOC.

18. These requirements are presented in essentially identical fashion in each of the 20 BOC filings.[4] In each case, the claimed revenue requirement is stated to be the company's estimated 1984 "budget view", that is, the company's "best estimate of future costs" (*e.g.*, New York Tel., Vol. 1, p. 3-2). The budget view is a list of approximately 59 items relating to unseparated investment, expenses, taxes, and reserves listed in work papers. However, no documentation is presented to explain the source and development of the budget view figures. Although the Budget View is the source for all the figures which are used to derive interstate amounts, and thus the basis for all the access costs and rates, the discussion of the budget view occupies less than two and a half pages in each BOC filing. The following quotation states the main point presented in these pages:

> These estimates (i.e., the budget view) are consistent with the principles and procedures outlined in the modified Plan of Reorganization (POR), which implements the Modification of Final Judgment (MFJ). As such they reflect the estimated financial data subsequent to transfer of assets and personnel to various units of post-divestiture AT&T. (Vol. 2-1, p. 2-1 of each BOC filing.)

The budget view figures are then put through three stages of adjustment and allocation: 1) they are adjusted to delete costs associated with (and recovered from) AT&T — BOC post divestiture contracts; 2) they are put into the separations process to derive detailed interstate category costs; and, finally, 3) they are allocated as the revenue requirement for each access rate element based on estimated demand. Those revenue requirement figures are used by the ECA to calculate the ECA tariff rate

[3] It also proposes a single Transport rate element rather than the separate Common and Dedicated Transport rate elements required by Sections 69.11 and 69.112 of our Rules, as permitted by our one year waiver of those rules, *American Telephone and Telegraph*, FCC No. 83-287, released June 28, 1983.

[4] Diamond State Telephone, a BOC, filed jointly with Bell of Pennsylvania.

elements where some or all of the BOCs participate in the ECA pools; where the individual BOC has not joined the ECA pool for a particular rate element, the revenue requirement is used to derive the rate in the BOC's own tariff. Various commenters urge that the revenue requirements thus claimed in the ECA and BOC support material are not auditable, not cost supported as required by Section 61.38, and otherwise flawed.

19. We discuss first the budget view figures, themselves. SBS contends that no information at all is provided for the budget view numbers. MCI and Western Union believe, based on workpapers, that the 1984 budget view figures are derived from 1982 cost data adjusted to reflect "post-divestiture" conditions, but that the data and mechanism used are not presented or adequately documented.

20. In reply, the BOCs and CSO state that the 1984 budget views are based on 1982 accounting records, adjusted for growth to 1984 levels and for the impact of divestiture. They contend the accounting systems used are subject to continuing FCC review and thus auditable, and that back-up documentation is so voluminous as to be both virtually impossible for the telcos to assemble and submit and an intolerable burden on the Commission if filed. They state their willingness to supply information or documentation the Commission may deem essential. The BOCs assert, however, that providing the details of the development of the pieces of the 1984 budget would impose an enormous burden, without commensurate benefits, since serious forecasting errors can be adequately dealt with by monitoring actual experience under an appropriate accounting order.

21. As we pointed out above, the budget view is of crucial importance in these filings as the direct basis for the BOCs' claimed revenue requirements, the root for every individual rate. It is additionally important because of the BOC and ECA "top-down" methodology. That methodology is essentially a mechanism to distribute the budget view figures by applying first allocation and then demand factors to derive rate elements which recover the revenue requirement derived from the budget view. Any errors in the budget view would affect essentially every rate under this approach.

22. We have examined the BOC budget views in light of the comments and reply. As the commenters claim, it is not possible from these filings to evaluate or verify the figures in the budget view. First, the sources of the budget view figures are not clearly specified and cannot be checked. The support material only indicates that the budget views are 1984 estimates, without specifying the basis for such estimates. The BOCs/CSO reply states that the underlying data used to develop the 1984 revenue requirement is the accounting data for 1982 in each of the exchange carrier filings, derived from separations data, and that this data was adjusted by each exchange carrier to reflect both anticipated growth from

1982 to 1984 and the effects of divestiture. Yet without specific tracking of the figures from the 1982 data and specific explanation and justification of the adjustments the figures are not reviewable.

23. The reply suggests first, with respect to adjustments for divestiture, that the intense scrutiny by the Commission and the MFJ court in the course of the divestiture proceeding is sufficient to assure that the adjustments to reflect divestiture are correct. With respect to other adjustments, it urges that the local telephone exchange companies (telcos) have no incentive to overestimate growth in 1984 revenue requirements, because excess earnings might be refunded under an accounting order and the telcos could suffer diminished credibility with this Commission.

24. We cannot accept this reasoning as a substitute for proof. Close scrutiny now is essential to assure both that these initial filings are as reasonable as possible given the substantial changes in the industry, and that later filings correctly reflect modifications which prove necessary. Our responsibility also is to prevent both inadvertent and intentional overstatements of the local companies' revenue requirements; reliance on refunds to correct any errors in an expensive, and undesirable alternative to identifying and preventing them.

25. We recognize that the reply is correct in claiming that a full inquiry into all the background data, assumptions, and studies underlying even the development of the revenue requirement would involve massive amounts of information. It is said that support material to reflect divestiture adjustments exceed 250 pages for each BOC. It could be impractical or unproductive to attempt a complete review of such material. Since all BOC filings use a consistent methodology, which does not appear to be unreasonable *per se*, acquiring this level of detail also appears unnecessary. As discussed below, we believe that by requesting specific sample and case study information, the staff can probe the filings sufficiently to make an initial judgment of their reasonableness in order to determine whether the ECA and BOC rates, with any necessary modifications, may be allowed to take effect in April.

B. Adjustments and Allocations of the Budget View Figures

26. The supporting documentation and methodology used to devise individual rates from the budget view figures, also are difficult to evaluate. The assumptions and estimates applied to the figures are often not specified or justified and the process relies on a series of computer programs which are not documented and have not been fully reviewed or approved as accounting mechanisms.

27. Once the 1984 budget view figures for expenses, investment and other categories were obtained, each figure was divided between the state and interstate jurisdictions. This involves three steps. First, 1982 data from the Interstate Settlement Information System (ISIS) was adjusted to

estimate what that data would have been if divestiture had occurred at the beginning of 1983. These results (referred to as the "1982 post-divestitures view") were used to develop separations allocation factors. That is to say, the apportionment between state and interstate in these adjusted 1982 figures for each category was calculated for use as an allocation factor to be applied to separate the 1984 budget figures for each corresponding category. Second, non-operational amounts arising from post-divestiture contracts between the BOCs and AT&T were removed from the 1982 post-divestiture view (*e.g.*, leases to AT&T of facilities assigned to the BOCs by the MFJ but used in part by AT&T). These calculations are stated to comply with the MFJ, but no explanation or documentation is provided. Third, these 1982 post-divestiture interstate allocation factors were applied to the 1984 budget view category figures to develop 59 estimated 1984 expense and investment figures. These calculations are shown in the work papers in the support material. However, in many cases, where "known future events or documented trends clearly indicate that 1984 relationships will vary significantly from the 1982 post-divestiture view ("*e.g.*, New York Tel. Vol. 2-1, p. 4-6), the BOCs used other allocations factors. For example, Pacific Telephone uses adjustment factors from 1.10 to 1.22 to increase interstate allocations of Central Office Equipment (Pac. Tel. Vol. 2-1, p. 5-33. Other adjustments were made to Traffic, Commercial, and Maintenance Expenses. New York Telephone uses an allocation factor of .29 rather than the calculated factor of .264 for depreciation and amortization expenses, a revision which SBS claims adds $19.25 million to the total 1984 interstate revenue requirement. Where the 1982 post-divestiture view figures are not used, in general no explanation or documentation of the factors actually chosen is provided. The commenters cite in addition numerous specific instances of mistakes, deletions, indecipherable material, and other asserted deficiencies in the ECA and BOC support material.[5]

28. The 59 estimated interstate costs derived from this procedure are then used to determine the access rate elements using the CSO's newly developed Access Charge Analysis System (ACAS), which consists of 8 subsystems. First, the 59 cost items are disaggregated into 740 sub-items. This disaggregation is based on the 1982 separations ratios, adjusted for growth and divestiture. These adjustments are not explained and it is not clear what relation they bear, if any, to the adjustments used to develop the 1984 budget view. Next, each of the 740 items is assigned to a Part 69 access rate element or to a non-access element. Eight special studies were

[5] Although it may be unrepresentative, one allocation module in New York Telephone's support material, cited by MCI, contains unsupported data, questionable treatment of post-divestiture contracts, arithmetic errors, unexplained adjustments to interstate allocations, and missing support information.

applied to determine allocations, primarily allocations between Switched and Special Access rate elements. Investment accounts are multiplied by the 12.75% rate of return to determine the return requirement, *i.e.*, the allowed profit. A report of these allocations and calculations is then put through a computer program to create a revenue requirement for each of 16 access rate elements.

29. Commenters contend that the models and studies used in this system are not adequately documented. (MCI, Lexitel, Western Union, ITT, U.S. Tel.) They note for example that the adjustments for divestiture and growth are undocumented and that the computer programs are new and have not been reviewed. The BOCs/CSO reply that a full display of the underlying details for divestiture adjustments would be extremely voluminous, and that it made available extensive documentation of these procedures of the allocation process, in response to a detailed request by Western Union as early as August 1, 1983 even though all of this material is not reproduced in the filing.

30. We are sympathetic to both sides on this point. The CSO did, commendably, make available extensive backup documentation before the ECA tariff was even filed. Nevertheless, as we discuss below, further information is needed to evaluate the methods used in the ECA and BOC filings. Additional data will also be necessary with respect to the Special Studies, for which only cursory documentation is submitted.[6] Further information is also necessary to evaluate the computer programs, *see* Section 1.363 of the Commission's Rules. 47 C.F.R. § 1.363.

31. The final step of the rate development process was to estimate demand for the rate element and derive an initial unadjusted rate -a rate calculated basically by dividing the revenue requirement for that element by the quantity of demand forecasted. This initial rate was then adjusted to reflect the "feedback" effect the rate itself and rates for substitutable

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[6] The reply agrees with some comments that the allocation approach apparently used in Special Study H is incorrect under Section 69.306(g) or our Rules. The ECA allocated half of the traffic sensitive costs of Feature Group A (FGA, line-side ENFIA A type service) dial equipment minutes (DEMs) in Category 6 Central Office Equipment to Local Transport, to reflect tandem switching in that element. Section 69.306(g) provides that all traffic sensitive COE 6 shall be assigned to the Local Switching element. The reply agrees that the COE 6 costs allocated to Local Transport should thus be reallocated to Local Switching, specifically to LS 1 which is the rate element for FGA switching. Because the ECA filing assigns two DEMs to each FGA access minute (reflecting two dial switch connections for each line side connection), the effect would, it is estimated, double the LS 1 element which applies to FGA. Local Transport rates would not change measurably. As MCI points out, however, at least some FGA traffic will make a single local switch appearance, in instances where a single end office serves both the IC and its customer. Doubling the access minutes thus apparently over-allocates costs to LS 1. The reply suggests that readjustment of the LS 1 rate could be deferred and we believe such deferral is the better course for purposes of developing the monthly FGA rate.

services would have on demand. Based on simple supply and demand considerations, a rate increase will tend to suppress demand, and a rate reduction will tend to stimulate it. This demand response, anticipating customer reactions to the end user rates, is used to adjust rates until rates, demand, and costs are balanced.

32. The ECA and BOC demand methodology parallels the cost methodology. Baseline demand estimates were harvested from the 10 BOCs who participated in the non-mandatory carrier's carrier rate elements in the ECA tariff. Those estimates of 1984 interstate minute volumes are said to be based on actual 1982 minutes of use that would have been subject to interstate access charges if divestiture had taken place in 1982. No documentation is provided for these Corporate Views. The corporate view figures were then disaggregated into forecasted access minutes for categories of service (*e.g.*, intra- and inter LATA, intra- and interstate, and into mileage bands) using the LATA Analysis Data System (LADS) computer program. Forecasts of other Switched Access, Special Access and Billing Collection demand quantities were also developed. Special Access demand was estimated from the inventory of private lines in service in 1982 which were "grown to 1984 levels using broad aggregate private line service rates." ECA, Vol. 4, p. 3-3. A surrogate flat rate for FG A lines which were not measured (*i.e.*, ENFIA and FX/ONAL lines from switching machines without measurement capability) was also computed based on usage data submitted by the BOCs. Similar demand data was collected from the independents.

33. The ECA asserts that there is no historical demand from which future access tariff demand can be forecast directly. Based on certain simplifying assumptions, however, it developed forecasts for pre- and post-access charge end user service prices. These forecasts (which of course predate changes mandated by the *Second Reconsideration Order*) are as follows for major services:

Percentage Change in Service Prices (National)

Service	*Estimated Percentage Price Change*
Residence MTS, MTS-like	–12.34
Business MTS, MTS-like	–12.34
WATS and WATS-like	–15.55
Private Line	+16.04

Based on these estimates, estimates of cross-elasticities of demand for these services, and estimates of traffic that will bypass the local network in 1984, changes in service quantities from the 1984 baseline forecast

were calculated. The independents were assumed to closely approximate the aggregate of the BOCs for the demand response. The final rates were based on demand figures derived from this process.

34. An example of this process can be seen in calculation of the Carrier Common Line rate element. Initial estimates of total MTS and WATS access minutes (excluding closed end WATS) and OCC minutes, subject to a 65% non-premium discount, were used to calculate the preliminary Carrier Common Line rate as follows:

Carrier Common Line Charge

1. Revenue Requirement	$ 6,902,455,420
2. Total MTS and open end WATS access minutes	131,358,256,006
3. ENFIA A, B, and C OCC minutes	19,481,097,272
4. Premium Carrier Common Line Charge L1/(L2 + (L3 × .65))	$ .0479 per minute
5. Non-premium Carrier Common Line Charge (L4 × .65) (ECA, Vol 3-6, p. 5-9)	$ .03115 per minute

The demand response was then calculated based on the following projections of the effect on end user demand of the per line access charges, surcharge, and other rate changes: the total revenue requirement would increase slightly; demand would decline for local private lines by 1.11%, for residence lines by 0.7%, and for business lines by 0.88%; OCC minutes were estimated to increase by 5.10% and MTS and WATS minutes by 4.39%. These estimates reflect shifts in usage from the private line services (projected to experience rate increases) to MTS, WATS and OCC services (projected to experience rate reductions.) These demand responses were then used as the basis for the final Carrier Common Line calculation.

Carrier Common Line Charge with Demand Response

1.	Revenue Requirement	$ 6,930,015,875
2.	Total MTS and open end WATS WATS access minutes	137,125,148,875
3.	ENFIA A, B, and C OCC access minutes	20,473,685,625
4.	Premium Carrier Common Line Charge L1/(L2 + (L3 × .65))	$ .0461 per minute
5.	Non-premium Carrier Common Line Charge L4 × .65	$ .0299 per minute

(ECA, Vol. 4, p. 8-20)

35. Our concerns with the demand methodology are similar to those for costs. The corporate view from which all disaggregated demand figures are derived is said to be "grown" from actual 1982 demand figures, but the bases for the growth factors are not stated or documented. The reply states, again, that that material would be extremely voluminous yet the demand figures are essential to the rate calculations under the "top down" methodology. The estimates of AT&T and OCC minutes of use directly determines the Carrier Common Line rate element, as we have seen, as well as the other usage—sensitive carrier rate elements. Any error in the demand forecasts would directly affect the rate. *Cf, AT&T, (DDS)*, 62 FCC 2d 774, 780-81 (1977). The fact that the demand figures are based on estimates from the corporate views, the basis for which are not stated, is thus of substantial concern in evaluating the resultant rates. For example, demand for long distance telephone service is significantly affected by overall economic conditions. Without information on the assumed status of the national economy it is impossible to evaluate whether the projections from 1982 data are likely to be accurate, or indeed whether they are reasonable in view of actual 1983 data. The private line (Special Access) demand forecasts also are lacking in substantiation. For example, New York Telephone (which joined the ECA for these services) based its estimates of Special Access rate elements on studies of its private line inventory dating back to 1977 and its estimates of 2 and 4 wire access connections and voice grade protocol combinations on the views of panels of experts. (NYT, Vol. 4, p. SAI-1-2.)

36. We recognize that demand forecasts inevitably require assumptions and guesses. We expect these to be reasonable and educated guesses. Moreover, substantial changes in the communications industry and in the rate elements create specific conceptual problems here. As the

reply points out, forecasting "is especially difficult here, where it is necessary to predict demand under the access charge structure in the post-divestiture environment." BOCs/CSO reply, p. II-61. The ECA and BOCs have also submitted substantial amounts of data and background on the disaggregation of demand. Nevertheless, because the initial corporate view figures are unsupported and many aspects of the disaggregation process are unclear or based on unknown assumptions, further information is necessary. The demand forecasts also need to be clarified to prepare us to monitor actual demand and determine how closely it corresponds to the forecasts.

C. Switched Access Rates

37. Switched Access services are those that involve use of local switching by the telco's end office for access. In the *Second Reconsideration Order*, we deferred end user charges for residential and single-line business customers for Switched Access until June 1985. For the Switched Access provided to ICs, we prescribed eight rate elements, to be assessed where the IC used the service provided under the element. The ECA has filed rates for each of these elements with the exception of Limited Pay Telephone for which it reports no service.[7] These rates are listed in the accompanying table:

Proposed ECA Switched Access Rates

Element	*Rate*
Carrier Common Line	
Premium	$.0461 per minute
Non-premium	.0300 per minute
Line Termination	.0070 per minute
Local Switching	
LS 1 (OCCs)	.0058 per minute
LS 2 (AT&T)	.0090 per minute
Intercept	.0085 per 100 minutes
Information	
Directory Assistance	.4963 per DA call

[7] It also proposes a single Transport rate element rather than separate Common and Dedicated Transport rate elements required by Sections 69.11 and 69.12 of our Rules, as permitted by our one year waiver of those rules, *American Telephone and Telegraph*, FCC No. 83-287, released June 28, 1983.

Proposed ECA Switched Access Rates

Element	*Rate*
Directory Transport	.0020-.0203 per call (based on distance)
Transport	
Call Miles	Rate per minute
0 to 1	.0044
Over 1 to 8	.0101
Over 8 to 16	.0117
Over 16 to 25	.0126
Over 25 to 50	.0203
Over 50 to 100	.0285
Over 100	.0453
Billing and Collection	Various rates for recording, billing, billing analysis, and billing information.

The tariff also proposes an additional nonrecurring Access Connection charge (which we discuss in the Nonrecurring Charge section, *infra*) and other service and optional charges. There is also a minimum monthly usage charge.

38. As we discussed in our review of the overall methodology for allocating costs, we can not accurately judge the reasonableness of specific rates without further information. Moreover, the changes mandated in the Second Reconsideration Order will require adjustment of many of these charges, and will alter or moot some of the issues raised by the comments. No definite conclusions can be made with regard to these rates as filed. In general, however, although various questions remain with respect to assumptions, allocation methods, and details, the overall methodology appears to conform to that prescribed by the Part 69 Rules.

39. Some issues raised by the comments can usefully be addressed here. SBS and other commenters assail the Local Transport rate structure and choice of mileage bands. SBS contends that a fairer structure would have a flat per mile charge rather than the declining per mile charge as rate bands are passed which the ECA and BOCs propose. The BOCs/CSO reply contends that the proposed structure more accurately reflects the mix and costs of transmission facilities used to provide Transport. We have not determined a single reasonable Transport rate structure. Facility costs and types are likely to vary among carriers and we are not prepared to conclude that one or another structure is correct. In the access tariffs at least three different approaches are proposed. The ECA and BOCs as

we have seen propose a declining rate per mile. The GTE companies propose a flat rate per mile. Rochester proposes a flat rate for all Transport, regardless of distance. None of these is unreasonable facially, for the important issue is the underlying costs of all aspects of Transport, including general overhead and administrative costs, the nature of the facilities network, and the cost characteristics of the facilities. We will allow each of these approaches to be used pending a determination of a preferred or optimal rate structure.[8] We are concerned, however, about the choice of rate bands and the associated rate jumps in the ECA tariff. The "0-1 mile" band is quite small and the rate increase abrupt, 129% for an extra mile or more. The rate increase from the 1-8 to the 8-16 band, by contrast, is only 15%. We are requesting further justification for the specific rate bands. See Appendix D, Section 6.

40. Some commenters urge that the cost of nonchargeable options available only to AT&T to provide WATS should be made chargeable features, or should not be provided solely to AT&T at all. While we agree that the optional features for WATS (such as blocking and screening) should be accurately assessed to that service, and probably unbundled eventually, it appears that facilities limitations in this as in other cases prevents making these features available to other ICs immediately. We also have no specific basis for concluding that the costs of these options are not recovered from the overall charge.

41. Significant rate variations do exist among the Switched Access rate elements filed by various carriers, although not nearly as extreme as the variations among Special Access rates. Changes will be required in many of those rates to comply with the *Second Reconsideration Order* and this order. Given the substantial changes in the industry, the difficulty of projecting costs and demand, and the need to establish initial access charges, we believe generally that it will be preferable to allow Switched Access rates to become effective if not obviously unreasonable and if adequate information is provided to understand their development. Monitoring of the effects of the rates should be more practical and effective than attempting to fine tune these rates initially.

D. Special Access Rates

42. Special Access includes a variety of services and facilities which we have included in the access charge plan so that the divested BOCs may offer them under access tariffs as mandated by the MFJ. These include segments of interstate or international private lines, ranging from telegraph grade and voice grade to high capacity analog and digital channels. Neither the access charge plan nor the MFJ requires changes in the rates, rate structures or provisions currently applied to these services,

[8] We grant Rochester's request for wavier pending further consideration of this issue.

with certain limited exception.[9] Although we contemplated that Special Access could be unbundled into several separate subelements, we did not specify a structure. We emphasized, however, that the subelements, must be consistent with applicable Commission rules and decisions and that we would scrutinize carefully the choice of subelements and data to ensure compliance with the Communications Act. *First Reconsideration Order*, para. 12 and Section 69.113(d) of the Commission's Rules.

43. The Special Access portion of the ECA tariff is 230 pages long and lists hundreds of separate rates plus extensive technical material. It is the most controversial section. Commenters point out that the rate structure is totally changed and the rates generally increased substantially from existing rates for these facilities. Rates in many cases are 200 to 400% higher. Rates for identical facilities also vary substantially, by factors of a hundred or more in some cases, among the various access tariffs. Ordering requirements are more onerous and associated nonrecurring charges are also subject to dramatic increases.

44. The ICs (except for AT&T) currently obtain these facilities under the various BOC tariffs providing Facilities for Other Common Carriers (OCCs), filed in the mid 1970s to implement the Docket 20099 Settlement Agreement. Because of the basic changes in the rate structure it is impossible to compare rates directly—there are no comparable rate elements. Comparing typical channels indicates the magnitude of the proposed increases as they would be experienced by the ICs and, since these charges are generally passed through directly, by the ICs' customers. For a two wire voice grade local loop from an end user to an IC within the same wire center the price would increase by from 117 to 855% in selected BOC filings, and the total cost from current rates as low as $4.20 to proposed rates as high as $80.20.

Current and Proposed Monthly Special Access Charges

Two-wire Voice Grade Interexchange, intra-wire center
3 Airline Miles
Zero Special Transport

	PA	SD	CA	NY	TX	IL	DC
Current OCC charges, total	$13.78	4.20	8.81	12.93 (ECA)	9.10 (ECA)	5.11	8.40
Proposed SA charges, total	29.92	26.44	41.17	61.39	61.39	32.96	80.20
Percent increase	117%	530%	367%	217%	575%	545%	855%

[9] The tariffs must implement the MFJ with respect to LATA boundaries and the offering of services to AT&T on the same terms as other ICs. The tariffs must also apply the Special Access Surcharge we developed to recover a reasonable contribution to local exchange revenues from unmeasured traffic which "leaks" into the local exchange by means of PBXs and other switching devices.

Other facility arrangements would experience similar or greater rate increases. It appears to be the case that virtually all Special Access loop rates would at least double in price and many would increase 8 times or more.

45. The proposed rates also vary enormously from one tariff to another. The two-wire special access line (SAL) rate element is $9.39 for South Dakota, $34.28 for the ECA and $58.50 for the District of Columbia. The four-wire SAL varies from $26.50 in Missouri to $74.81 in D.C. Other charges are far more widely split. C-type conditioning which costs $.42 in Delaware and $1.15 in Ohio costs $15.38 in Maryland and $45.12 in California. A NO/NO voice grade to telex facility interface which is less than a dollar in 5 states[10] costs over $10 in ECA regions and three other jurisdictions.[10A]

46. Individual customers report similar increases. Dow Jones states that rates for local connections in its private line network will increase by 152 to 551%, its installation charges by 580 to 2000%, and its overall yearly costs for local loops on one multipoint circuit from $3.4 million to a minimum of $8.6 million. The American Library Association states that the cost of private lines used to access the largest bibliographic data base would be increased by 60 to 84% and that an increase of this magnitude could threaten the viability of many library databank systems. Western Union calculates that its monthly charges for Special Access facilities used for telex, TWX and private line services will increase by 237% or $139 million, from $57.7 million to $197.7 million. The increase for nonrecurring charges would be even greater, from $1.9 million currently to $36 million, an increase of 1800%. Some of its individual circuits would experience rate increases as great as 11,000%. The effect of passing through these charges, it estimates, would be a 40% increase in its telex rates, which would cause a drastic shrinkage in its subscriber base. It estimates that 50% would discontinue telex service, especially because AT&T's competing Dataphone service is scheduled to decrease in price. Western Union asserts that if the Special Access charges proposed by the ECA and the BOCs is permitted to take place, it will seriously threaten the viability of all non-AT&T services employing Special Access facilities.

47. The comments argue strenuously that these major rate increases are unreasonable and unjustified, based on inflated or misallocated costs, flawed or undocumented studies, and a discriminatory rate structure. They contend that the telcos have failed to bear the burden of proving that the rates are cost justified. They urge the Commission to hold unlawful and cancel the proposed charges, or at the very least phase in

[10] Missouri $.60; Ohio (Ohio Bell) $.64; Nebraska and Wisconsin $.92, and Delaware $.98.

[10A] District of Columbia $11.90; Idaho (Pacific Northwest Bell) $12.10; ECA $13.30; and Washington $16.88.

the increase over an adequate transition period. The BOCs/CSO reply defends the overall allocation of costs to Special Access and the particular approaches to disaggregate those costs to Special Access rate elements. It defends the variations in loop and other costs on grounds that costs vary significantly among jurisdictions and costs also are affected by the extent to which AT&T is colocated with an exchange carrier. For example, it cites figures indicating that composite N—and T — carrier unit investment costs are 80% higher in Arizona than in Georgia. It does not dispute the rate increases calculated by the commenters, but argues that short haul channels have been underpriced in comparison to longer haul and that the filings correct this.

48. As we discuss in detail in Appendix B, with respect to Section 7 of the tariff, we have concluded that the proposed Special Access rate structure is unreasonable, discriminatory, and violative of Commission decisions and policies. The filed structure will therefore have to be replaced. The proposed nonrecurring charges are also unlawful, as we discuss in the next section. We also have inadequate information upon which to judge the reasonableness of the overall allocation of costs to Special Access by way of the budget and corporate views or the specific allocation of costs to Special Access services. The shift of WATS closed end loops to Switched Access will also cause significant changes in Special Access costs. It is apparent as well that additional information will be necessary in to understand the bases and justification for the proposed rate changes. The magnitude of the increases makes it clear that the telcos are proposing to radically change the manner in which local private lines are priced and provided. While we recognize that even large percentage increases may be justifiable in those instances where rates have not changed over a long period of rising costs, the present filings provide virtually no information on these matters.

49. It is clear from these circumstances that the Special Access section must be substantially replaced, at least to correct its structure. Further information and, most likely, a further investigation will also be needed to probe the development and justification for these rates. Although we could adopt the suggestion of some of the commenters and prescribe the continuation of the OCC Facility Tariff rates until an acceptable lawful filing can become effective, or require the filing of a "baseline" Special Access tariff which implements only changes necessary to implement access charges and divestiture (proposed by the National Association of Broadcasters and other parties), or extend the suspension period an additional two months while we investigate Special Access (proposed by Western Union), we have decided to defer the possible application of some or alls of those approaches at least for the moment. Because a new Special Access section will be necessary in any event, and we wish if at all

possible to implement a complete access tariff by our April 3 target date and avoid the need to extend the BOC-AT&T contracts any further past the January 1 date of divestiture, we will give the telcos an additional opportunity to file Special Access provisions which can be allowed to go into effect April 3. The filing must explain fully the basis for any change in rates proposed, not just the top-down allocation process described in the present filings and the overall projected revenue changes which the carriers will experience. We will scrutinize the proposed filings carefully within the notice period to determine whether they may be allowed to become effective.

50. Some commenters argue that there is an independent legal ground requiring rejection of the Special Access rates, arising from the Docket 20099 Settlement Agreement. Pursuant to that agreement, AT&T and the BOCs filed the OCC Facility tariffs and agreed also that during an interim period they would make changes in the rates only upon 6 months' notice (including any period of Commission suspension) and supported as required by Part 61 of the Commission's Rules.[11] The interim period ends when the revised rates become effective. Western Union contends that the support information filed does not comply with Part 61 and that the "outrageous multiplicity" of rates indicates that the numbers must simply have been made up. It argues that part of the bargain in the Agreement was that the rates would be cost supported, and that this bargain circumscribes the normal discretion of the Commission in rate setting matters, citing *MCI Telecommunications Corp. v. F.C.C.*, 665 F.2d 1300 (D.C.Cir. 1981). We differ somewhat in our view of the Agreement, which we believe does not limit the Commission's discretion. The Agreement provides only for longer than normal notice and the support information normally required under Part 61. The OCCs will have received the required six months' notice by April 3 and substantial cost support, including specific information on the costs of providing OCC and ENFIA facilities for 1982, the most recent calendar year for which data are available. This is all the parties bargained for. What they are now entitled to is the same as any other party or member of the public—that the Commission will carry out its duties to ensure just and reasonable rates. By suspending and investigating the filings we have sought to carry out these duties. We will seek to probe the support information further to determine whether the further Special Access filing is lawful, but the rights of parties under the Settlement Agreement will terminate by operation of that Agreement when Special Access rates become effective, either under Section 204 of the Act or further Commission order.

[11] *AT&T*, 47 FCC 2d 660 (1974), 52 FCC 2d 727 (1975), *aff'd sub nom.* Carpenter v. FCC, 539 F.2d 242 (D.C.Cir. 1976).

E. Nonrecurring Charges

51. The Access Charge Rules and Orders provide no specific directions for nonrecurring charges (NRCs) to cover the planning, development and installation of facilities. We decided to scrutinize such charges carefully when filed and, if necessary, develop guidelines for costs that may be recovered from such charges. *First Reconsideration Order*, para. 145.

52. For Switched Access, the major NRC is the Access Connection rate element. This is essentially an installation charge. The ECA explains that the NRC cost "covers the activities required to negotiate and process the service order, design the circuit, assign equipment and facilities, and install the service between the IC and the entry switch." To compute the revenue requirement to be recovered by this rate element, the ECA and BOCs disaggregated these upfront costs from other costs of Local Transport. The charge for Access Connections is based on the capacity ordered, measured as Busy Hour Minutes of Capacity (BHMCs).[12] The proposed ECA rate is $10 per BHMC. Since a voice grade line is considered to represent capacity of 30 BHMCs, the Access Connection charge for a voice grade local loop would be $300. Channels of higher bandwidth would have correspondingly higher charges. This charge varies substantially among other telcos. Among the BOCs who have not joined the ECA for Switched Access, the lowest charge is $6.08 in Michigan. The highest is Bell of Pennsylvania which would charge $17.78 in Pennsylvania and $48.96 in Delaware. A comparison of the proposed ECA rate with selected BOC and independent company rates is presented in the following table:

Access Connection Rate Element per BHMC
Selected Exchange Carriers

ECA	$10.00
Rochester	None
Ohio Bell	10.00
Bell of Penn.	17.78
United Tel.-Ohio	1.00
New Jersey Bell	11.41
Illinois Bell	12.59
Pacific Tel.	15.37

Other NRCs apply to performance options.

53. The rationale for basing the nonrecurring Access Connection rate element on BHNCs given by the carriers is that the MFJ requires of the BOCs that "the charges for delivery or receipt of traffic of the same type

[12] The busy hour is defined as the average time-consistent busy hour for the highest twenty consecutive business days in a calendar year.

between end offices and facilities of interexchange carriers within an exchange area . . . shall be equal per unit of traffic . . . " MFJ, 552 F.Supp. at 233-34.

54. Many of the comments vigorously oppose the Access Connection charge, arguing that it is exorbitantly high to recover the costs associated with ordering and installing service, that the methodology used is flawed and arbitrary, and that the wide variation in charges demonstrates the lack of justification for the proposed charges.

55. We have examined the support information and conclude that the development of the Access Connection costs and rates is seriously flawed and lacking in adequate support. First, conceptually, we should point out that while nonrecurring costs can generally be more efficiently and equitably recovered by nonrecurring charges, if those charges accurately reflect costs, this is not essential; nonrecurring costs need not be charged separately. Some or all of those costs are often included in the overall costs recovered by the monthly rate for the service, in this case Local Transport. We did not require that Local Transport costs be disaggregated, nor is it always easy to separately identify those costs which are part of overall operations and those which should be assigned to individual service requests. Several of the independent telcos have, for example, proposed no Access Connection charge for Switched Access.

56. In addition, the rationale for assessing the Access Connection rate per BHMCs is unpersuasive. The only basis cited is that the MFJ requires it. In fact, however, the MFJ provides no apparent support for BHMCs, as Allnet for example points out. The MFJ requires that the rate for local transport shall be equal per unit of *traffic* for all ICs. The access Connection charge, by contrast, imposes a rate for local transport costs per unit of *installed capacity.* The difference is substantial, particularly in its effect on the rates charged to AT&T and competing ICs. AT&T will pay no Access Connection charges for the capacity in place to carry its traffic; it will pay only a rate based on use, per minute of traffic. The newer ICs, who will be initiating or expanding their networks, will require more installation and rearrangements. They will thus be likely to pay greater relative shares of any charge based on capacity and will, in addition, pay the same per minute charge for traffic.

57. Even if the MFJ supported use of BHMC, the carriers would still be required to demonstrate that the practice is consistent with the Communications Act and Commission rules, policies, and requirements. The distribution of nonrecurring costs by rates based on BHMCs, however, is unreasonable as a form of equitable cost recovery. It is unlikely that all the up-front administrative and technical costs of beginning transport service are related in any direct way to the capacity ordered. Many of the functions are likely to be identical whether the order

is for 2 circuits or 200. Other costs, such as installation costs, where not already recovered in usage rates, may well be higher when greater capacity is installed, but probably not in direct, linear proportion. It may, for example, be little more costly to connect one high capacity channel than one voice grade, and it probably is not ten times as expensive to connect ten circuits as it is to connect one. Setting nonrecurring charges on the basis of BHMCs ignores these actual cost considerations. While some averaging of costs by setting NRCs on the basis of the size of an order might be reasonable, an explanation and justification would be necessary. Here the only justification is the apparently baseless one that the MFJ requires it.[13]

58. The actual methodology used to establish the revenue requirement for nonrecurring costs is also of serious concern. As in the case of other aspects of cost development, the ECA uses the BOCs' methodology, studies, and actual figures. Yet because of the variations and gaps in these methods, and differing adjustments, the figures and results appear to be highly unreliable. A similar approach was used for Special Access nonrecurring charges, and it has similar problems. An analysis of the nonrecurring charge cost and rate development is included in Appendix A.

59. In summary, we find that the rate structure proposed for Access Connections, which bases the rate on BHMCs ordered, is unreasonable. Although a nonrecurring charge which better expresses actual up-front costs could be reasonable, we also conclude that the development of the nonrecurring costs in the present ECA and BOC filings is nevertheless inadequate as a basis for such charges. Based on these conclusions, and the need to bring workable Switched Access rates into effect as soon as possible, we are directing the ECA and BOCs to eliminate the Access Connection element for switched access. On an interim basis, carriers may recover nonrecurring Local Transport costs in either of two ways. First, the legitimate costs which the ECA and BOCs disaggregated from the overall Local Transport revenue requirement may be recovered by inclusion in the Local Transport rate element. Second, while we will consider proposals for other nonrecurring charges in future filings, on an interim basis, for purposes of the tariff filings we are ordering in this decision, any nonrecurring charge for Switched Access shall be no higher than the existing charge under the OCC Facility tariffs. This will allow the status quo to continue and a reasonable opportunity to consider other proposals under normal notice periods. Carriers wishing to propose such

[13] The failure of BHMC pricing to reflect nonrecurring costs also has a snowball effect on other provisions in the ECA and BOC tariffs. Nonrecurring charges are used generally as a basis for calculating rearrangement, move, and cancellation charges, and short notice-short duration surcharges. To the extent that BHMCs do not correlate with nonrecurring costs, these other rates are also likely to be distorted.

charges must specifically reference the charge and its application from the corresponding OCC tariff in their support material.

F. Section 61.38

60. Section 61.38 of our Rules specifies the material to be submitted in support of tariff offerings.[14] For changed matter, this includes a cost of service study for all elements of costs for the most recent 12 month period. Section 61.38(a)(i), 47 C.F.R. § 61.38(a)(i) The ECA and BOCs did not submit a general cost of service study with their filings,[15] stating that the rates filed are for new service offerings. They also contend there is no experience with the filed access rates from which to develop a study, and that the complete restructuring of access terms and conditions would render the attempt to develop one impossible or meaningless. ITT contends that access service is not new, but a repackaging of an old service which requires a past year study.

61. We believe that the ECA and BOCs are correct that a past year cost of service study would be burdensome and of little value given the major changes in services, arrangements, and the carriers themselves. We are, however, directing an information request to carriers which we hope will elicit comparable information in a more useful form.

G. Conclusions on Rates and Rate Methodologies and Further Information Requests

62. Our review of the ECA and BOC filings reveals no unacceptable approaches in the cost and rate methodology. A "top-down" approach is not unreasonable *per se*; there are various cost and rate development methodologies which may be acceptable to develop costs and rates. The chosen approach also corresponds to that anticipated in our Part 69 rules, including the use of 1984 estimates (*e.g.*, Section 69.502(a), 47 C.F.R. § 69.502(a)), the use of Separations Manual procedures to assign cost elements, and the calculation of specific Commission-designated rate elements. The ECA and BOCs have also submitted substantial support information, which for the most part appears to describe adequately the process as a whole and its specific stages.

63. Nonetheless, the filings do present substantial problems and issues which lead us to conclude that further information is needed before we can conclude that the tariffs should be allowed to become effective. As described above, the budget views, of which the rates and rate levels are direct mathematical descendents, are undocumented. It is impossible to judge their initial reasonableness, nor will we be able to identify how closely they correspond to actual operational experience. The company

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[14] Section 69.1(b) of our Access Rules expressly provides that access tariffs be filed and supported as provided in Part 61, which includes Section 61.38.

[15] The BOCs did submit historical information for 1982 on ENFIA and OCC facility costs.

view used to project demand is similarly undocumented, and equally important. In the absence of further information, we cannot evaluate the basic assumptions determining the filed rates. Because no comparisons with past rates are provided, we also cannot accurately assess the changes which these filings represent for telcos, ICs, and customers. In addition, the many assumptions, judgments and estimates used throughout the cost development processes present formidable problems to both initial and continuing review.

64. Our goal in this investigation remains to resolve the major issues necessary to assure that the initial access tariffs are generally reasonable. Although further information is needed, we believe that a limited information request to clarify and test the major assumptions in the ECA and BOC filings and fill in important gaps will allow us to meet this goal, if the information confirms the reasonableness of the filings. The Common Carrier Bureau is accordingly preparing a letter describing the necessary information to be supplied by the ECA and BOCs with revised tariff filings implementing revisions mandated by the *Second Reconsideration Order* and other sections of this order. The letter requests primarily additional specific information on the budget and corporate view figures and assumptions, plus further details on the methodology as it was applied in practice by a specific BOC. Because a single overall methodology was used, this case study should provide useful insight into the process without unmanageable and unnecessary submissions. One exception to this approach is for the Information or Directory Assistance rate element. We are requiring additional information on local and state rates and costs for directory assistance in order to develop data to consider issues of costs, potential discrimination, and the likely advantages of a phase-in for long distance directory assistance charges.

65. The information request should be useful in preparing us to monitor the effects of the access tariffs on customers and the extent to which operational experience corresponds to the projections on which the rates are based. Some of the commenters have also suggested that we establish a specific monitoring plan for this purpose. We believe this is desirable, particularly in view of the major changes in the industry resulting from divestiture, the changes in relationships which will result from access tariffs, and the responsibility we have assumed to assure that the access charge process accomplishes our goals. Accordingly, the Bureau is directed to prepare a further information request to monitor how closely the telcos meet the projections on which their rates are based and what their actual numbers are.

66. If we are to avoid additional delay in the effective date of access tariffs, the filing schedule we establish must necessarily be more limited than we prefer. The carriers will require time to make changes to comply

with this order and the *Second Reconsideration Order*. We will require sufficient notice between the filing and scheduled effective dates to verify such compliance. This filing schedule is set out in the conclusion of this Order. With respect to the costs and rates, it is particularly important that telcos comply fully with this information request and that necessary rate changes are properly filed. Failure to comply fully will of course require further delay in the effectiveness of the tariffs of non-complying carriers.

IV. Tariff Provisions and Regulations

67. Our review and investigation of the access tariff provisions - the regulations, restrictions, format, structure and other non-rate aspects of the tariffs - have been directed to assure both their general justness and reasonableness and their compliance with Commission rules, orders, and policies. Tariffs are required to show, in schedules open to public inspection, all charges and the classifications, practices and regulations affecting such charges. Sec. 203(a) of the Act 47 U.S.C. § 203(a). Unjust or reasonable terms and conditions unreasonable discrimination or preferences are forbidden. Sec. 202(a), 47 U.S.C. § 202(a) A tariff states the terms of the contract for service the carrier offers to all eligible members of the public.

68. That offering must comply with both technical and substantive requirements. Technically, under Part 61 of our Rules, the tariff must contain "clear and explicit terms regarding rates and regulations . . . so as to remove all doubt as to their proper application." Section 61.55(f), 47 C.F.R. § 61.55(f) All rules, regulations, exceptions and conditions are to be clearly stated, Section 61.55(g), 47 C.F.R. § 61.55(g), and all charges stated in a simple or systematic manner, Section 61.55(h), 47 C.F.R. § 61.55(h). The tariffs must comply with these and the other filing, format and content requirements in order to ensure that their terms are explicit, understandable, and reviewable.

69. Substantively, the access tariffs must properly carry out both the Part 69 Access Charge Rules and other Commission orders and policies. A fundamental Commission goal is to foster a competitive market, open to all, for communications services and equipment. Tariffs may not generally prohibit or restrict resale, *AT&T v. FCC*, 572 F.2d 17 (2d Cir. 1978), *cert. denied* 439 U.S. 875, or the interconnection of equipment, *Carterfone*, 13 FCC 2d 420, 14 FCC 2d 571 (1968), or services, *AT&T, Interconnection of Private Line Services*, 60 FCC 2d 939 (1976). Customers may use communications services in any way which is privately beneficial, so long as it is not publicly harmful, and the burden of demonstrating public harm is on the carrier proposing the restriction, *Hush-A-Phone Corporation v. U.S.*, 238 F.2d 266 (D.C. Cir. 1956), *Carterfone*. A carrier also may not have different tariffed rates for like service, absent justification for applying different rates, *Western Union*

International, Inc., v. FCC, 568 F.2d 1012 (2d Cir. 1977), *cert. denied* 436 U.S. 944 (1978), *American Trucking Ass'n v. FCC*, 377 F.2d 121 (D.C. Cir. 1966), *cert. denied* 386 U.S. 943 (1967).

70. Based on the record in a notice and comment investigation such as this, if we conclude that a tariff charge, classification, regulation, or practice is or will be unlawful, we may, within the broad limits of our discretion, select from a number of options to remedy the defects. We may, for example, prescribe reasonable provisions, Sec. 205(a), 47 U.S.C. § 205(a) and Sec. 201(a), 47 U.S.C. § 201(a), direct the carrier to file revisions correcting the unlawfulness, *National Association of Motor Bus Owners v. FCC*, 460 F.2d 561 (2d Cir. 1977), or take such other action not inconsistent with the Act as may be necessary to exercise our functions Sec. 4(i), 47 U.S.C. § 154(i) *Lincoln Telephone and Telegraph Company v. FCC*, 659 F.2d 1092 (D.C. Cir. 1981). We may institute broad policy changes while leaving fine-tuning for future proceedings, *AT&T v. FCC*, 572 F.2d 17 (2d Cir. 1978), *cert. denied* 439 U.S. 875, *cf. WJG Telephone Company v. FCC*, 675 F.2d 386 (D.C. Cir. 1982).

71. Our section-by-section review of the ECA tariff, the comments, and the reply is presented in Appendix D. These findings, both in the overview and individual modules, constitute the bulk of our decisions and orders. We have attempted to review all sections of the tariff, but have not listed all necessary changes. Where changes in other sections are necessary to conform to the decisions in an overview or specific section, these also are required. Overall, the ECA tariff appears to be a functional vehicle for implementing access charges, although changes will be necessary to implement the *Second Reconsideration Order*. Many of our comments and directions are editorial in nature, to eliminate ambiguity or duplication, or to obtain further explanation. In other circumstances, we might have been able to remedy these problems informally in the course of the tariff review process. However, we also find that numerous specific provisions and a number of important segments of the tariff are unreasonable or unjustified. This is particularly true in areas for which the Commission did not draft specific rules, but left implementation to carrier initiative and close scrutiny in the tariff review process.

72. In each case, where changes proved necessary, we have sought to select the most appropriate remedy within the span of our authority and discretion, balancing the needs of telcos, equipment vendors, and customers. In some cases we have deferred action to a later proceeding, for example by requiring the carrier to file revisions or further information at or before the time of the 1985 tariff filing. In other cases we have requested additional justification immediately before permitting a provision to take effect. In yet other cases, we have prescribed interim remedies pending further action based on a more complete record. We

have also prescribed terms and conditions, where we have concluded both that the existing provision would be unjust, unreasonable, unreasonably discriminatory, or unlawfully vague, and that another provision would be just and reasonable.

73. The ECA also proposes to include in the access tariff extensive technical material dealing with interconnection and transmission standards. We are concerned with both of these areas. The interconnection sections propose to apply our Part 68 rules for terminal equipment to carrier-carrier interconnection, by largely incorporating but in some cases modifying those rules. Applying Part 68 to carriers, however, would apparently impose new restrictions on carrier-carrier arrangements, stricter than those in currently effective OCC tariffs which have proven effective in protecting the network from harm. No justification is provided for new restrictions, and we conclude that the proposed approach is thus in conflict with principles of *Hush-a-Phone and Carterfone*. As an interim matter, we are requiring carriers to maintain the standards in existing carrier tariffs by extracting the relevant material and incorporating it in the access tariff by a technical reference. We are considering tariff requirements and appropriate procedures for arriving at standards in MTS and WATS-Market Structure. Notice of Proposed Rulemaking, Structure Phase III, C.C. Docket No. 78-72, FCC 83-178, released May 31, 1983. The inclusion of a somewhat modified version of Part 68 in the tariff could also be confusing (and improper) where Part 68 applies: a carrier may not alter our rules by tariff. We direct the carriers to remove the Part 68 material and reference the rules directly.

74. Some commenters claim that the proposed transmission standards are lower than currently provided and in some cases unacceptable to meet service needs. The BOCs/CSO reply that standards in most cases meet or exceed current standards. It is difficult to compare standards because of questions as to what the standards mean (for example, whether they represent guarantees of minimum performance or signals triggering the need for maintenance) and because the standards do not apply when the facilities are grandfathered or whenever the standards cannot be met. The circuit elements to which standards are applied have also changed in some cases. In general, the standards do not appear unreasonable despite these concerns, but they do raise a more fundamental concern. Before divestiture, a single network manager, the Bell System, could often provide end-to-end service by choosing among design and routing options that normally exist to optimize performance. Impairments in transmission[16] along particular portions of a route[17] could be accommodated to provide an end-to-end service which met a customer's needs while making optimal

[16] *E.g.*, maximum noise on a channel, signal dropouts, envelope delay, impulse noise.

[17] *E.g.*, local loop interexchange plant, toll plant.

efficient use of the network. Trade-offs could be made. We believe the benefits of this optimization process should be maintained to the extent feasible in the post-divestiture environment, though the Bell System can no longer serve as a single network manager. Within this content, proposals for standards which would apply to one segment of the network must be considered as elements in the overall network optimization process. We believe that resolution of such technical issues can best be handled by an industry-wide forum, as proposed in our CC Docket No. 78-72, Phase III Notice, *op. cit.* Our decisions in this case are thus tentative and interim in nature.

A. Other Matters

75. We have attempted in this order to deal with all major issues in this phase of this docket. Some specific matters warrant further mention.

76. As we noted in the *Investigation Order*, approximately fifty exchange carriers neither joined the ECA tariff for all its provisions nor filed or participated in any other access tariff. Without an access tariff on file these carriers could not recover the revenue requirements associated with the access rate elements. We contacted each of these carriers to ask how each proposed to comply. Apart from carriers mistakenly omitted from the ECA tariff, twenty-five carriers wished to join the ECA tariff, six wished to join the Small Exchange Telephone Company tariff, and seventeen carriers wished to concur in the Pacific Telephone and Telegraph Company tariff. We decided to permit the carriers to join the respective tariffs, (see CCB Mimeo 1358, released December 15, 1983), because it allowed the carriers to participate in access revenues and the effect on the rates and revenue pools was *de minimus*.

77. New York Telephone and Pacific Telephone and Telegraph filed requests for somewhat different "lifeline waivers" of the $2 end user charge. Because the $2 charge was deferred until June 1985 in the *Second Reconsideration Order*, those petitions are moot.

78. The ECA and other tariffs contain no rate element for Limited Pay Telephone, *i.e.*, pay telephones and coinless pay telephones which can access the services of only one interexchange carrier. The ECA states that public phones such as Charge-a-Call Station are not dedicated to the interexchange services of a particular carrier. We will monitor these services to verify that they are correctly rated.

79. Some commenters, (Allnet, AT&T), urge that the per minute rates for Switched Access should properly be time-of-day sensitive, with lower evening and night rates to reflect the lower costs of such off-peak usage. While we agree that a time of day structure should eventually be established for these rates, we have not required this additional step in these initial access tariffs. Other comments also raise issues not properly

within the scope of this proceeding, *e.g.*, issues considered and resolved in the *Second Reconsideration Order*. We do not address these here.

80. A general problem in the ECA tariff is the use of a single rate, $26.21, for a wide range of administrative activities, including the altering of an address, the switch to a different presubscribed carrier, and the modification of an order. We have found no explanation for how this charge was established; the charge also does not take into account likely differences in the typical costs of such functions. It may also be counterproductive for a telco to impose a charge in some cases, for example, to correct inaccurate or changed customer information, since the customer's failure to come forward may cause the telco's own records to remain inaccurate. We request further justification for the charge and its application.

81. Foreign exchange (FX) service presents a number of problems. Interstate FX is presently priced as a composite service, including an interstate private line component and local exchange service. In the *Second Reconsideration Order*, both to eliminate the discrimination inherent in pricing FX at a very different rate than the essentially identical ENFIA-A, and to reflect the very different usage of many FX and ENFIA customers, we retained FX billing on the basis of minutes of use even though we prescribed interim flat rates for OCC ENFIA-A type services. A small percentage of local end offices, however, are not presently equipped to measure FX usage. In these offices, per minute rate cannot be applied. The ECA has proposed a monthly rate based on 4076 minutes. However, this figure would impose a substantial hardship on a small user who would pay the higher assumed rate if it happened that the local telco end office was not equipped to measure usage. The average also does not appear to be based solely on end user usage in those exchanges. As an interim measure, until measurement capability is available, we will permit telcos either to continue to charge a rate equivalent to the local business rate to end users receiving FX or to propose alternative usage surrogates. Another problem involves so-called "string FXs," a local exchange service provided across adjacent state borders or telephone company boundaries which is generally little different from other local exchange service. In some cases the "FX" line might be simply across a highway which is also a border. Regions using string FX are generally rural areas which look to a cross-border town for community services. A number of exception rates are included in current applicable tariffs (e.g., AT&T Tariff F.C.C. No. 260, § 3.2.2(c)(1)(d)) which bar imposing interstate private line rates upon the facilities used. We have received a number of letters and petitions from communities subject to such rates suggesting that applying access charges or eliminating exception rates could result in very substantial rate increases for no

changes in service. We will examine carefully any carrier requests to eliminate these exceptions or any other actions which have that effect. The carriers should, at a minimum, explain why other alternatives, such as modifying the exchange boundary or an Extended Area Service arrangement, would not be preferable and better recognize the essentially local character of such services.

V. Major Conclusions Requiring Further Action

82. Special Access is a primary concern. Neither the Access Charge Orders nor divestiture required changes in the rates or rate structures for the private line services provided under Special Access. The ECA and other access tariffs, however, propose to restructure these offerings radically, although little justification is given for the need for such changes. Rates would also increase enormously in many cases. Moreover, the rates for carriers ostensibly using the same methodology vary drastically for the same services and facilities. These differences are so great as to forfeit the credit which might be placed in any of the rates. The rate structure is also seriously flawed, as we describe more fully in Appendix D.

83. Directory assistance charges present analogous problems on a smaller scale. One of our basic policy goals is to move toward rates which recover the costs of service from the cost-causer where feasible. The costs of long distance directory assistance appears to be a service where calls can and should be recovered from those who place the calls, rather than spread to all long distance callers. A high proportion of long distance information calls are in fact made by large businesses such as credit agencies which have taken advantage of directory assistance being provided as a free good. Others, including local residential customers, should not bear the burden of such costs. Assigning an accurate rate to these calls will also encourage overall efficiency in use of the service, and possibly competitive offerings. A cost-based rate should thus be both more equitable and more efficient.

84. In the present case, however, the cost basis for the directory assistance rates is very doubtful. The rates vary widely for no discernable reason. For example, the rate in the District of Columbia is $.22 and in West Virginia $.93 though both are C&P Telephone companies. The support material also present substantial questions, including whether costs are fairly assigned to state and interstate use. These rates are also substantially higher than the state rates in most cases, and state rates generally permit a number of free calls. The charging of very different rates to customers for the same service is a matter of concern. For these reasons - to move toward rates fairly based on costs, and to permit consideration of the actual costs and possible issues of discrimination, - we are prescribing an interim one year charge no higher than 25 cents for the

directory assistance service call element of access tariffs for carriers whose charges are on a per call basis. We are also requesting further information from the carriers in order to resolve issues relating to directory assistance and will consider these issues later in this investigation.

85. The proposed ordering arrangements, including the planned facilities order provision, are also unjustified and in substantial part unreasonable. The nonrecurring charges represent large increases to existing charges, though no obvious changes in costs are involved and it is unclear that the increases are reasonably related to costs. Many of the features would also allow telcos to decide arbitrarily the amount an IC would pay and the obligations to which it would be subject.

IV General Conclusions and Directions to Local Exchange Carriers

86. In the *Investigation Order* which began this proceeding less than four months ago, we expected that enormous effort would be required by this Commission, the carriers, and the interested public. This was not an overstatement. The mass, detail, and level of analysis of the comments and reply give testimony to the importance and range of the issues for carriers, equipment suppliers, and the public. Much has been accomplished and many issues resolved. Yet even more may remain to be done. The Common Carrier Bureau will very shortly be sending further information requests to certain carriers and the ECA. It will also act on delegated authority to adopt an order addressing changes needed in other, non-ECA access tariffs. Although the policy decisions and specific corrections required by this order apply to all access tariff provisions which are the same or relatively similar to the ECA's, others with differing provisions raise separate problems. These are relatively scattered in the other 75 access tariffs and those carriers should proceed with the work of preparing whatever changes are necessary in their tariffs because of this order. Where we have addressed specific provisions of non-ECA tariffs, the respective carriers should of course prepare to implement our conclusions. The Bureau will release the order for non-ECA tariffs to give additional directions as soon as possible. We will also consider orders dealing with the divestiture related tariffs in Phase II of this docket, including AT&T's interstate tariffs, within the next few weeks.

87. We expect that the information supplied with the new filings and the specific rates and provisions will comply with this order, so that we may allow the revised tariffs to become effective. In any event, we will continue this investigation to monitor the filings and consider the additional issues which we have not fully or permanently resolved here, and the many new issues certain to arise. Any issues which have not been

fully addressed or resolved in this order will be included in the continuing investigation.

88. Because of the tight schedule we are trying to meet and the mass of material the filing carriers must prepare and we must review, by this order we are establishing a specific set of requirements for all revised access filings:

* Filing carriers must make no changes in section or page numbers of pending access tariffs except as specifically required in this or in forthcoming orders. Revisions required by these orders should be made without changes in section numbering. Section numbers of provisions required to be deleted should not be used for new material, except where the new material is a replacement dealing with the same subject.

* Filing carriers must make no revisions, corrections, alterations, or other changes in the rates, terms, or conditions of the access tariff in the prescribed filing, (other than to correct typographical errors such as spelling) except as expressly required or approved in this order and the *Second Reconsideration*. These revisions shall conform to the applicable rule requirements in Part 61 of our Rules, particularly the symbolization requirements of Sections 61.55(e), 61.94 and 61.118(a). However, the carriers need not symbolize material reissued without change as is required by Section 61.118(b). To do so would result in symbolization that would be confusing. Specific instructions concerning the administrative details of filing these revisions can be found in Appendix C. Other changes which the filing carrier wishes to propose must be made in a separate filing pursuant to Part 61 of the Commission's Rules. 47 C.F.R. § 61.

* The filing carrier shall file in a separate volume as part of its support material a report specifying all revisions on a section-by-section basis, listing the language now pending, the proposed language (if any) and a reference to the specific Commission order, page and section or paragraph number which is implemented. The carrier may include any explanation or justification of the proposed revisions in a separate section-by-section format.

89. We do not expect to modify or waive the requirements of this order before the effective date of conforming tariffs absent exceptional circumstances. Reconsideration petitions or additional tariff filings should provide adequate opportunities to present any claims that revisions are needed. If a carrier does wish to request a waiver to allow a tariff provision which does not conform with this order to become effective immediately, it should present a full explanation and justification all requests for immediate relief in the form of a single waiver request submitted no later than February 29, 1984.

90. Carriers are directed to file revised tariffs conforming with this order no later than March 15 to be effective April 3, 1984. We will strive to maintain this schedule. However, we realize that the task of revision will be a lengthy and difficult one. It is nonetheless of crucial importance to meeting the April 3 date that filings be done correctly and well - and even more important that they be done quickly. We have completed this initial review of the tariffs well before the overall target date so that it might be possible for new tariffs to become effective April 3 as planned. We hope

that the information provided and modifications made by carriers to the provisions and structure of their tariffs will remedy most of the problems identified concerning rates. However, as can be seen from the body and appendices of this order, many of the problems we have identified, both rate and others, are serious; it may be difficult for carriers to correct the provisions or demonstrate that no correction is needed. We need to know as soon as possible whether the carriers will be able to meet this schedule. We therefore direct the ECA to poll the filing carriers and report to us no later than February 29, 1984 whether the carriers will be able to meet the March 15 filing date. If the carriers require more time, an appropriate motion for extension should be filed with the February 29 report.

91. Several telcos have submitted applications for special permission to file various revisions to their respective access tariffs. Subsequent to the filing of these applications, modifications required by this Order and by the *Second Reconsideration* have rendered many of the revisions requested in those applications inappropriate or inaccurate. Accordingly, we are denying the pending applications for special permission listed in Appendix C.

92. Nonsubstantive revisions (correction of typographical errors such as spelling) may be made at the same time as required modifications under this Order.

Ordering Clauses

93. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201, 202, 203, 204(a) and 205, of the Communications Act, 47 U.S.C. §§ 154(i),(j), 201, 202, 203, 204(a), and 205, that the tariff material submitted under Exchange Carrier Association Transmittal No. 1 is unlawful to the extent indicated herein.

94. IT IS FURTHER ORDERED, That the Exchange Carrier Association shall file revised tariff material in compliance with this order no later than March 15, 1984 with a scheduled effective date of April 3, 1984.

95. IT IS FURTHER ORDERED that the Exchange Carrier Association shall reference appropriate AT&T and BOC Tariffs for Other Common Carriers (and other applicable material resulting from meetings on interconnection pursuant to CC Docket 20099) as existed on April 2, 1984, to the extent necessary to substitute for material in Section 2.5 found unlawful. For this purpose, waiver of Section 61.74 of the Rules is granted. To the extent that no existing tariff contains necessary connection provisions (for example, those for services such as HC1C-4), any special provisions such as the Interim Programs for customer provided CSU and CSU-equivalent connections should be delineated in the ECA tariff. Moreover, IT IS ORDERED that the appropriate material referenced by the ECA tariff, including any presently used documents which resulted from the CC Docket 20099 meetings on interconnection, should

be retained in posting locations required pursuant to Section 61.72 of the Rules.

96. IT IS FURTHER ORDERED, That Sections 61.58, 61.59, 61.74 and 61.118(b) of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, 61.74 and 61.118(b) are waived to the extent required to file tariff revisions implementing this Order.

97. This order is exempt from the provisions of the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.* It involves a rule applicable to particular rates and to practices relating to such rates within the meaning of the exemption contained in 5 U.S.C. § 601[2].

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

*Commissioner Dawson's statement may be seen with Memorandum Opinion and Order, FCC 84-36, 97 FCC 2d_____

APPENDIX A: Rates

Switched Access Service Elements: Rate Comparison

Company	*Access Connection[1] NRC[2]*	*Local Transport[1] MRC/Min[3]*	*Local Switching[1] MRC/Min LS1*	*LS2*	*Line Termination[1] MRC/Min.[3]*	*Intercept[1] MRC/100 Min.[4]*
ECA	$10.00	$.0044-.0453	$.0058	$.0090	$.0070	$.0085
Bell of Pennsylvania:						
Pennsylvania	17.78	.0008-.0239	.0051	.0080	.0051	.0075
Delaware	48.96	.0002-.0299	.0060	.0085	.0047	.0036
C&P Telephone:						
District of Columbia	10.00	.0092-.0092	.0061	.0080	.0089	.0001
Maryland	10.00	.0078-.0537	.0050	.0072	.0056	.0001
Virginia	10.00	.0084-.0590	.0064	.0082	.0071	.0001
West Virginia	10.00	.0094-.0803	.0072	.0116	.0081	.0005
Cincinnati Bell:	ECA					

[1] See introduction to Section 6, Appendix D for a description of these Switched Access Service rate elements.
[2] Nonrecurring charge.
[3] Monthly recurring charge per minute.
[4] Monthly recurring charges per 100 minutes.

Switched Access Service Elements: Rate Comparison

Company	*Access Connection NRC*	*Local Transport MRC/Min*	*Local Switching MRC/Min*		*Line Termination MRC/Min*	*Intercept MRC/Min*
Bell:	$ ECA	$	$ *LS1*	$ *LS2*	$	$
Illinois Bell:	12.59	.0064-.0375	.0065	.0090	.0073	.0001
Indiana Bell:	ECA					
Michigan Bell:	6.08	.0018-.02	.0041	.0083	.0061	.0001
Arizona	ECA					
Colorado	ECA					
Idaho	ECA					
Montana	ECA					
New Mexico	ECA					
Utah	ECA					
Wyoming	ECA					
Nevada Bell:	ECA					
New England Telephone:	ECA					
Maine	ECA					

Switched Access Service Elements: Rate Comparison

Company	Access Connection NRC	Local Transport MRC/Min	Local Switching MRC/Min LS1	LS2	Line Termination MRC/Min	Intercept MRC/Min
Massachusetts	*ECA*					
New Hampshire	*ECA*					
Rhode Island	*ECA*					
Vermont	*ECA*					
New Jersey Bell:	*11.41*	*.0037-.0121*	*.0047*	*.0065*	*.0049*	*.0054*
New York Telephone:						
New York	*ECA*					
Connecticut	*ECA*					
Northwestern Bell:						
Iowa	10.00	.0087-.0462	.0051	.0081	.0065	.0122
Minnesota	10.00	.0031-.0462	.0049	.0073	.0064	.0088
Nebraska	10.00	.0050-.0586	.0043	.0068	.0056	.0390
North Dakota	10.00	.0074-.0602	.0065	.0104	.0083	.0158
South Dakota	10.00	.0049-.0535	.0083	.0124	.0108	.0178
Ohio Bell:	10.00	.0108-.0642	.0057	.0079	.0055	.0060
Pacific Northwest Bell:						
Idaho	10.00	.0097-.0760	.0053	.0104	.0094	.0197
Oregon	10.00	.0057-.0430	.0052	.0094	.0085	.0267

Washington	10.00	.0047-.0294	.0053	.0092	.0081	.0197

Switched Access Service Elements: Rate Comparison

	Access	*Local*	*Local Switching MRC/Min*		*Line*	
	Connection	*Transport*			*Termination*	*Intercept*
Company	*NRC*	*MRC/Min*	*LS1*	*LS2*	*MRC/Min*	*MRC/Min*
Pacific Bell:	*15.37*	*.0051-.0837*	*.0095*	*.0128*	*.0102*	*.0111*
South Central Bell:						
Alabama	*ECA*					
Kentucky	*ECA*					
Louisiana	*ECA*					
Mississippi	*ECA*					
Tennessee	*ECA*					

Switched Access Service Elements: Rate Comparison

Company	*Access Connection NRC 2*	*Local Transport MRC/Min 3*	*Local Switching MRC/Min*		*Line Termination MRC/Min.*	*Intercept MRC/100 Min.*
			LS1	*LS2*		
GTE:[1]						
Alabama	$14.31	$.00048838	$.00722466	$.01359616	$.01188930	$.00002347
Alaska	17.13	.00286722	.00708340	.01642519	.01494464	.00000000
Idaho	13.23	.00084982	.01154923	.02193616	.01968821	.00007927
Wisconsin	10.06	.00090538	.00734795	.01619691	.01334682	.00000000

[1] *We listed only a few of the states within the territories of these independent telcos.*

Switched Access Service Elements: Rate Comparison

Company	*Access Connection NRC*	*Local Transport MRC/Min*	*Local Switching MRC/Min*		*Line Termination MRC/Min.*	*Intercept MRC/100 Min.*
			LS1	*LS2*		
Centel:[1]						
	2		3	4		
Illinois	$.00197906	$.00197906	$.00559837	$.01024239	$.01002054	$.001309
North Carolina	.0059035	.0059035	.00284481	.00284481	.00632006	.000599
Texas	.005753	.005753	.004443	.004443	.01434	.0008
United:[1]						
Arkansas	2.00	.0235-.0680	N/A	.0114	.0132	N/A
Florida	7.00	.002-.016	.008	.013	.019	.01175
New Jersey	1.00	.002-.028	.006	.010	.010	.00533

[1] *We listed only a few of the states within the territories of these independent telcos.*
[2] *Same as Local Transport.*
[3] *Used FGA.*
[4] *Used FGC.*

Special Access Service Elements: Rate Comparison

Company	*Access Connection:[1] MRC 4 - Wire Facility*
New Jersey Bell:	$ 2.73
Bell of Pennsylvania:	
Delaware	1.70
Northwestern Bell:	
Minnesota	21.78
	Access Connection: MRC DS 1 Facility
ECA	$ 102.35
C&P Telephone:	
District of Columbia	60.84
Maryland	186.38
Virginia	242.03
West Virginia	2.71
Illinois Bell:	405.25 + 54.60 per mile
Michigan Bell:	2.63
Northwestern Bell:	
Iowa	102.35
Nebraska	102.35

[1] *See introduction to Section 7, Appendix D for a description of the Special Access Service rate elements.*

Special Access Service Elements: Rate Comparison

Company	*Special Transport:[1] MRC DS 1 Facility*
ECA:	$ 38.02 + 15.09 PMI[2]
C&P Telephone:	
District of Columbia	60.84
Maryland	986.38
Virginia	242.03
West Virginia	2.71
Michigan Bell:	15.63
Northwestern Bell:	
Iowa	38.02 + 15.09 PMI
Minnesota	38.02 + 15.09 PMI
Nebraska	38.02 + 15.09 PMI
Wisconsin Bell	4.27 + 5.84 PMI

[1] *See introduction to Section 7, Appendix D for a description of the Special Access Service rate elements.*
[2] *Per mile.*

Special Access Service Elements: Rate Comparison

Company	*Special Access Line:[1] MRC 2 - Wire Facility*
ECA	$ 34.28
C&P Telephone:	
District of Columbia	58.50
Michigan Bell:	20.20
New York Telephone:	20.97
Northwestern Bell:	
South Dakota	9.39
GTE:	
Alabama	23.93
Arkansas	7.27
California	20.74
California-NW	37.37
Montana	78.99

Special Access Service Elements: Rate Comparison

	Special Access Line: MRC 4 - Wire Facility
ECA:	$ 54.20
Bell of Pennsylvania:	36.35
C&P Telephone:	
District of Columbia	74.81
Michigan Bell:	26.50
GTE:	
Alabama	47.86
Arkansas	14.54
California	41.48
California-NW	74.74
Montana	157.98

[1] *See the introduction to Section 7, Appendix D for a description of the Special Access Service rate elements.*

2. ECA Non-Recurring Charges

Introduction

The ECA's proposed plan for recovering non-recurring costs for facility installation and related services[1] represents a significant departure, from the present rate structure and levels of exchange carriers. Comparisons with current levels of non-recurring charges (NRCs) for switched and special access facilities reveal enormous proposed increases. SBS estimates that proposed NRCs for switched access represent increases of 800% over levels the OCCs are currently assessed and proposed NRCs for Special access represent increases of up to 1000%.[2] Western Union asserts that its annual NRCs would increase $34,074,000 from the current level of $1,902,000, a increase of 1,800%.[3] In New York, for instance, Western Union estimates its NRC for installation of a 2-wire voice grade facility would increase from $42.00 to $568.95, an increase of 1,255%; in California, the increase would be from $10.50 to $748.00, an increase of 7,024%.[4] The magnitude of these increases does not appear to be atypical.

If we were to allow the ECA's proposed NRCs to go into effect, grave economic consequences might result. Non-recurring installation charges of the magnitude the ECA is contemplating would probably pose significant barriers to entry for small and growing firms. Such charges would tend to lock customers into their existing carriers. Such a result would be in direct contradiction to the purpose of our *Access Charge Orders*. At the very least, these NRC increases would cause significant market dislocation, creating new burdens for interexchange carriers and customers alike.

Besides the need to address the public policy implications of increases of such magnitude, justification of such increases would require, at the very least, thorough cost support for the proposed rates. In addition, cogent arguments would have to be made in support of the new rate structures proposed (e.g., assessing switched access NRCs on ordered busy hour minute of capacity). Indeed, the burden of proof that such increases are "just and reasonable" lies with the carrier.[5]

General Cost Methodology

The NRC cost support material that the ECA has submitted[6] relies on "Special Study M," conducted by each BOC, to allocate cost items developed by the Access Charge Analysis System (ACAS) into recurring and non-recurring components. Special Study M uses "top-down" disaggregation methods to develop the non-recurring revenue requirements for switched and special access service. Therefore, the accuracy of Special Study M is critical for the validity of the proposed switched and special access NRCs and related order modification NRCs. However, Special Study M appears to suffer from significant problems of methodology and documentation.

The ECA itself casts doubt on the results produced by Special Study M. It states:

> "The nonrecurring results for Switched Access, . . .which were obtained using the top-down disaggregation procedures, were evaluated for reasonableness. The work activities associated with installing a circuit for Switched Access were compared to work activities

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[1] The ECA proposes non-recurring charges for installation of Switched and Special access services, for order modifications and for additional engineering, including presubscription changes.

[2] SBS, *Comments*, p. 45-46.

[3] Western Union, *Comments*, p. 6.

[4] Western Union, *Comments*, table 5.

[5] Section 204(a) of the Communications Act, 47 U.S.C. § 204(a).

[6] ECA, Volume 1 and Volume 3-5.

> involved in Special Access circuit installation. Based on this comparison, it was tentatively concluded that the nonrecurring cost for Switched Access should be comparable to or less than the cost for the voice-grade Special Access services. . .The costs. . .developed using the top-down disaggregation methods, however, result in a charge higher than the Special Access charge on an average circuit basis. It was decided to set the nonrecurring charge per busy hours minute of capacity at $10, which on a per circuit basis is less than the nonrecurring charge for Special Access." (ECA Vol. 3-5, p. 2-1ff).

As a result, the ECA simply reduced the NRC for switched access developed by Special Study M from $16.61 to $10.00. This $10.00 figure lacks any further support in the cost material the ECA provided us.

Many commenters strongly disputed the validity of Special Study M.[7] Among the criticisms commenters made were that the disaggregation methods used in the study resulted in the inclusion of extraneous costs; that extremely important yet capricious adjustments were made to the study results; that the study was inauditable because it was so poorly documented; that alternatives methods could have been used which would have resulted in statistically valid estimates of non-recurring costs. According to SBS, the Study's crucial calculations of non-recurring expenses resulted in sizable overestimations of switched access customer-initiated installation costs. The Study included installation costs initiated by the exchange-carrier in the non-recurring costs to be recovered from customers. Many BOCs implicity recognized this and attempted to resolve the problem by reducing the Study results by arbitrary factors.[8] For instance, New York Telephone discounted these expenses by 40%; Illinois Bell discounted certain of these expenses by 50%; yet Michigan Bell discounted the same category of expenses by only 5%. There appears to be similar motivation behind the ECA's arbitrary reduction of its $16.61 NRC for Switched Access Connection to $10.00 (an approximately 40% discount). Similar adjustment problems occur in computing special access non-recurring expenses. Together, the problems indicate significant defects with Special Study M methodology. They caution us in regard to either the casualness or the hurriedness with which Special Study M was conceived and conducted.

Switched Access NRCs

The ECA proposes to assess access connection charges on a per Busy Hour Minute of Capacity (BHMC) basis. However, there is nothing in any of the cost support material submitted to us that indicates that the cost of access connection is related to the amount of access capacity a customer orders. To the contrary, it would appear that non-recurring costs associated with "activities required to negotiate and process the service order, design the circuit, assign equipment and facilities, and install the service between the IC and the entry switch"[9] are largely independent of ordered capacity. The introduction of such a rate structure, which could be harmful to the fast-growing smaller interexchange carriers, requires convincing justification. However, the ECA's only support is a statement that the rate structure comports with the provisions of the MFJ in assessing an "equal charge per unit of traffic."[10]

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[7] For instance, ITT, *Comments* p. 58ff; SBS *Comments*, Sec. 4, p. 8ff; WU, *Comments*, 25ff.

[8] SBS *Comments*, sec. 4, 14ff and table 2.

[9] ECA, Vol. 3-5, p. 2-1.

[10] *Id.*

Special Access NRCs

As discussed above, petitioners also cited defects in the top-down methodology employed for computing special access non-recurring costs, similar to those described for Switched Access.[11] In addition, commenters have criticized the bottom-up unit cost calculations developed for non-recurring special access and the BANOR top- down/bottom-up reconciliation process as being excessively casual, poorly documented and prejudicial to the OCCs.[12] Western Union points out the enormous jurisdictional fluctuations in Special Access NRCs (WU, *Comments*, Table 10). They conclude that a comparison of the NRCs for various special access facilities (e.g., 2&4-wire SAL and VG1) reveals such extreme disparities that it is unlikely that these charges are in fact related to actual installation costs.

Other NRCs

NRCs for Order Modifications and Additional Engineering expenses (including presubscription) are based on the same unsubstantialed cost studies and unsupported rate structures. As a result they share the same infirmities as the NRCs for switched and special access.

CONCLUSION

The ECA and the participating BOCs have not supplied adequate information concerning non-recurring costs, nor have they succeeded in defending the highly controversial charges and rate structures they propose. The cost information they have submitted actually argues against its own usefulness as cost support. The studies by which BOCs ascertained their non-recurring revenue requirements seem seriously flawed.

While some increases in nonrecurring charges may prove to be just and reasonable, and some modification in the manner in which they are assessed may be warranted, the material the ECA has offered in support of these changes is unconvincing. Before these NRCs could become effective, more adequate justification must be provided. There are good reasons to believe that the costs allocated to nonrecurring elements can be easily recovered, for an interim period, by slightly modified recurring charges. Only a small part of total costs have been allocated to nonrecurring elements (approximately, 8.7% for Switched Access and 12.5% for Special Access).

APPENDIX B: Regulations of the ECA

1. Introduction

Appendix B contains a number of parts relating to the regulations of the ECA access and special construction tariffs. Part 2 contains a list of parties filing comments and reply comments on these tariffs, along with abbreviations for those parties. These abbreviations are used throughout our discussion of the ECA tariffs. Part 3 contains a list, by tariff and transmittal numbers, of all access and special construction tariffs filed by October 3, 1984. This list includes tariffs filed by the ECA, BOCs and independent telcos that did not concur in the ECA tariffs. Part 4 contains the table of contents of the ECA access tariff, while Part 5 includes a table that sets out which tariffs filed by the BOCs and independent telcos cross reference the ECA access tariff. The table in Part 5 is organized according to sections of the ECA tariff, and indicates which tariffs incorporate ECA language and which contain language that differs from the ECA.

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[11] See SBS, *Comments*, sec. 4, p. 24ff; ITT, *Comments*, p. 61ff.

[12] SBS, *Comments*, p. 29ff; ITT, *Comments*, p. 67ff; WU, *Comments*, p. 30ff.

2. Abbreviations of Commenters

The following parties have filed comments concerning the access charge tariffs filed by the Exchange Carrier Association, the Bell Operating Companies and independent local exchange carriers.

Ad Hoc Telecommunications Users Committee (AHTUC)

Aeronautical Radio, Inc. (ARINC)

Alascom, Inc. (AI)

Allnet Communications Services, Inc. (ACS)

American Broadcasting Companies, Inc., CBS, Inc., and National Broadcasting Company, Inc. (the Networks)

American Communications Ltd. (AC)

American Financial Services Association (AFSA)

American Hotel and Motel Association (AHMA)

American Library Association (ALA)

American Newspaper Publishers Association (ANPA)

American Satellite Company (ASC)

American Telephone and Telegraph Co. (AT&T)

Associated Press and Commodity News Services, Inc. (AP and CNS)

Association of Independent Television Stations, Inc. (INTV)

Association of Long Distance Telephone Companies (ALTEL)

Bryan 800 Communications, Inc. (BC)

Bunker Ramo - Eltra Corporation (BREC)

CAPCON Library Network (CAPCON)

City of Los Angeles (LA)

Central Committee on Telecommunications of the American Petroleum Institute (CCT)

Commissioner of Baseball (CB)

Committee of Corporate Telecommunications Users (CCTU)

Direct Marketing Association, Inc. (DMA)

Dow Jones & Company, Inc. (DJ)

Enhanced Communications Services Association (ECSA)

EMX Telecom (EMX)

General Communications Incorporated (GCI)

Federal Executive Agencies (FEA) with General Services Administration (GSA) and Department of Defense (DOD)

GTE Sprint (GTES)

Hughes Television Network (HTN)

Independent Data Communications Manufacturers Association, Inc. (IDCMA)

International Communications Association (ICA)

ISACOMM, Inc. (ISACOMM)

ITT Communications Services, Inc. (ITT)

Lexitel Corporation (LC)

Local Area Telecommunications, Inc. (LAT)

Mobile Communications Corporation of America (MCCA)

Missouri Public Service Commission (MPSC)

McCaw Communications Companies (MCC)

MCI Airsignal, Inc. (MCIA)

MCI Telecommunications Corporation (MCI)

National Association of State Universities and Land-Grant Colleges (NASULC) with Association of Community College Trustees (ACCT), American Association of State Colleges and Universities (AASCU), American Association of University Professors (AAUP) and National Association of College and University Business Officers (NACUBO)

New York Public Service Commission (NYPSC)

Online Computer Library Center (OCLC)

Office of Consumers' Counsel - State of Ohio (OCCO)

J.C. Penney (JCP)

RCA Communications, Inc. (RCA)

Rural Telephone Coalition (RTC)

Satellite Business Systems (SBS)

Satellite Data Broadcast Networks, Inc. (SATNET)

Teltec Saving Communications Co. and Satelco Incorporated (TSC/SI)

Telesphere Network, Inc. (TNI)

Telocator Network of America (Telocator)

United Press International (UPI)

United States Telephone Association (USTA)

U.S. Telephone, Inc., (USTEL)

Utilities Telecommunications Counsel (21 separate comments on individual access tarriffs) (UTC)

Vermont Department of Public Service and Vermont Public Service Board (VPSB)

Westinghouse Broadcasting and Cable, Inc. (WBC)

Western Union Telegraph Company (WU)

3. Summary List of Access Tariff Filings

PHASE I ACCESS TARIFFS

Company	*Access*		*Special Construction*	
	Trans. No.	*Tariff No.*	*Trans. No.*	*Tariff No.*
Exchange Carrier Assoc.				
Access Charges	1	1		
Wire Centers	1	2		
Special Construction			1	3
Bell Operating Companies				
Bell of Pennsylvania	689	41	689	42
C&P Telephone	117	3	117	6
Cincinnati Bell	341	35	341	39
Illinois Bell	700	43	700	44
Indiana Bell	703	34	703	35
Michigan Bell	470a	38	470a	39
Mountain States	650	65	650	62
Nevada Bell	1	1	–	–
New England Telephone	680	40	680	41
New Jersey Bell	388	38	388	36
New York Telephone	613	41	613	42
Northwestern Bell	924	52	924	51
Ohio Bell	629	38	629	42
Pacific Northwest Bell	89	8	89	8
Pacific Tel. and Tel.	1027	128	1027	129
South Central Bell	102	4	102	9
Southern Bell	1250	61	1250	60
Southern New England	287	34	287	35
Southwestern Bell	1222	68	1222	69
Wisconsin Bell	511	38	511	39
Independent Telephone Companies				
Anchorage Telephone Utility	8	4	–	–
Canby Telephone Assoc.	1	1	–	–
Carolina Telephone (United)	8	3	–	–
Centel – Florida	1	1	–	–
Centel – Illinois	1	1	–	–
Centel – Minnesota	1	1	–	–
Centel – Nevada	1	1	–	–
Centel – North Carolina	1	1	–	–
Centel – Ohio	1	1	–	–
Centel – Texas	1	1	–	–
Centel – Virginia	1	1	–	–
Century Tel. Enterprises	1	1	–	–
Citizens Telephone Co.	1	1	–	–
Concord Telephone Co.	1	1	–	–
Eagle Telecommunications	1	1	–	–
East Ascension Tel. Co.	1	1	–	–
El Paso Telephone Company	1	1	–	–
Fidelity Telephone Company	1	1	–	–

Company	*Access*		*Special Construction*	
	Trans. No.	*Tariff No.*	*Trans. No.*	*Tariff No.*
General Telephone Op. Cos.	1	1	2	4
Great Plains Communications	1	1	1	2
Highland Telephone Company	1	1	–	–
Kalona Coop. Telephone Co.	1	1	–	–
Matanuska Telephone Company	1	1	–	–
Merchants & Farmers Tel. Co. (Centel)	1	1	–	–
Orchard Farm Telephone Co.	1	1	–	–
Palo Pinto Tel. Co. (United)	4	2	–	–
Phillips County Telephone Co.	1	1	–	–
Pioneer Telephone Coop.	1	1	–	–
Rochester Telephone Corp.	1	1	–	–
Small Exchange Telephone Companies	1	1	–	–
Sylvan Lake Telephone Co.	1	1	–	–
Telephone Utilities Exchange Carrier Association	1	1	–	–
United Intermountain – Tennessee	9	4	–	–
United Intermountain – Virginia	10	5	–	–
United Tel – Arkansas	7	4	–	–
United Tel – Carolinas	4	2	–	–
United Tel – Florida	7	2	–	–
United Tel – Indiana	6	3	–	–
United Tel – Iowa	5	3	–	–
United Tel – Kansas	8	4	–	–
United Tel – Minnesota	4	2	–	–
United Tel – Missouri	7	4	–	–
United Tel – Northwest-Oregon	26	8	–	–
United Tel – Northwest-Washington	27	90	–	–
United Tel – Ohio	8	3	–	–
United System – Pennsylvania	1	1	–	–
United System – New Jersey	2	2	–	–
United Tel – Texas	5	2	–	–
United of the West – Nebraska	7	5	–	–
United of the West – Wyoming	8	6	–	–
Urban Telephone Corp.	1	1	–	–
Walnut Hill Telephone Co.	1	1	–	–
Wood County Telephone Co.	1	1	–	–
Wyoming Telephone Company	1	1	–	–

Other Companies

Company	*Access*		*Special Construction*	
	Trans. No.	*Tariff No.*	*Trans. No.*	*Tariff No.*
AT&T Communications	2	8	–	–
B.S.O.C.				
Cancel tariff	89	3	–	–
Cancel tariff	89	4	–	–
Cancel tariff	89	8	–	–
Cancel tariff	89	9	–	–
Cancel tariff	89	11	–	–
California – Oregon				
Cancel COATS tariff	39	8	–	–
Hawaiian Telephone Company				
Cancel tariff	652	3	–	–
Cancel tariff	652	18	–	–
Cancel tariff	652	20	–	–

PHASE I ACCESS TARIFFS - Modification and Cancellation of Docket 20099 tariffs

Company	*Access*		*Special Construction*	
	Trans. No.	*Tariff No.*	*Trans. No.*	*Tariff No.*
Bell of Pennsylvania	687	38	688	38
C&P Telephone	116	2	118	2
Cincinnati Bell	340	34	–	34
Illinois Bell	702	38	703	38
Indiana Bell	702	33	704	33
Michigan Bell	471	37	472	37
Mountain States	649	59	651	59
New England Telephone	681	39	682	39
New Jersey Bell	389	33	390	33
New York Telephone	614	39	615	39
Northwestern Bell	925	45	926	45
Ohio Bell	628	37	632	45
Pacific Northwest Bell	91	4	92	4
Pacific Tel. & Tel.	1028	126	1029	126
South Central Bell	103	3	104	3
Southern Bell	1252	55	1253	55
Southern New England	288	33	289	33
Southwestern Bell	1220	65	1221	65
Wisconsin Telephone	512	35	513	35

4. *Table of Contents of ECA Tariff*

Section 1. APPLICATION OF TARIFF

Section 2. GENERAL REGULATIONS

Section 3. CARRIER COMMON LINE ACCESS SERVICE

Section 4. END USER ACCESS SERVICE

Section 5. ORDERING OPTIONS FOR SWITCHED AND SPECIAL ACCESS SERVICE

Section 6. SWITCHED ACCESS SERVICE

Section 7. SPECIAL ACCESS SERVICE

Section 8. BILLING AND COLLECTION SERVICES

Section 9. DIRECTORY ASSISTANCE SERVICE

Section 10. SPECIAL FEDERAL GOVERNMENT ACCESS SERVICES

Section 11. SPECIAL FACILITIES ROUTING OF ACCESS SERVICES

Section 12. SPECIALIZED SERVICE OR ARRANGEMENTS

Section 13. ADDITIONAL ENGINEERING, ADDITIONAL LABOR AND MISCELLANEOUS SERVICES

Section 14. EXCEPTIONS TO ACCESS SERVICE OFFERINGS

5. Cross References of Other Access Tariffs to the ECA tariff

Cross References of
Other Access Tariffs
To ECA Tariff

CARRIER:	*General Regulations*	*Carrier Common Line*	*End User*	*Ordering Options*	*Switched Access*	*Special Access*	*Billing & Collection*
Bell of Pennsylvania		1					
C&P Telephone		1					
Cincinnati Bell		1		1	1	1	
Illinois Bell		1					
Indiana Bell		1		1	1	1	
Michigan Bell		1					
Mountain States		1		1	1	1	
Bell of Nevada		1		1	1	1	
New England Telephone		1		1	1		
New Jersey Bell		1					
New York Telephone		1		1	1	1	
Northwestern Bell		1					
Ohio Bell		1					
Pacific Northwest Bell		1					
Pacific Telephone and Tel.		1					
South Central Bell		1		1	1	1	
Southern Bell		1		1	1	1	
Southern New England		1		1	1	1	
Southwestern Bell		1		1	1	1	
Wisconsin Telephone		1*					
Independent							
Tel. Cos.							
Anchorage Telephone		1	1				
Canby Telephone Assoc.	2	1		1	1	1	1
Carolina Telephone (United)		1					
Centel-Florida		1**					
Centel-Illinois		1**					
Centel-Minnesota		1**					

CARRIER:	*General Regulations*	*Carrier Common Line*	*End User*	*Ordering Options*	*Switched Access*	*Special Access*	*Billing & Collection*
Centel-Nevada		1**					
Centel-North Carolina		1**					
Centel-Ohio		1**				****	
Centel-Texas		1**					
Centel-Virginia	1**						
Century Tel. Enterprises	2	2	2	2	2	2	1
Citizens Telephone Co.		1					
Concord Telephone Co.	1	2			2	2	
Eagle Tele-communications	2	2		1			
East Ascension Tel. Co.	2	1		1			
El Paso Telephone Co.	2	1		1			
Fidelity Telephone Company		1					
General Telephone Op. Cos.		1***					
Great Plains commun.	2	1		1	1	1	
Highland Telephone Co.		1		1	1	1	1
Kalona Coop.	2	1		1	1	1	1
Matanuska Telephone		1	1				
Merchants & Farmers (Centel)		1**		*****			
Orchard Farm		1					
Palo Pinto (United)		1					
Phillips County	2	1		1	1	1	1
Pioneer Telephone	2	1		1	1	1	1
Rochester Telephone		3					
Small Exchange Tele.	2	2	2	2	2	2	
Sylvan Lake		1		1	1	1	1
Tel. Utilities Exch.		1					
United Telephone of:							
Arkansas		1					
Carolinas		1		1	1	1	
Florida		1					
Indiana		1					
Iowa		1					

Iowa		1					

CARRIER:	*General Regulations*	*Carrier Common Line*	*End User*	*Ordering Options*	*Switched Access*	*Special Access*	*Billing & Collection*
Kansas		1					
Minnesota		1					
Missouri		1					
Northwest							
Oregon		1					
Pennsylvania		1					
Northwest-Washington		1					
New Jersey		1					
Ohio		1					
United							
United Inter-Mtn-Tenn.							
United Inter-Mtn. Va.							
United Tel.-Texas		1					
United of the West-Nebr.		1					
United of the West-Wyoming		1					
Urban Tel. Corp.	2	2			2	2	
Walnut Hill		1					
Wood County	2	2			2	2	
Wyoming	2	1		1	1	1	2

1= *Largely incorporates ECA provision, but differs slightly, for example, adds an introductory statement.*

2= *Incorporates ECA provision verbatim.*

3= *Rochester has same rate for Carrier Common Line as ECA but has different regulations.*

* *Omits last three paragraphs of the ECA's general description.*

** *Carrier Common Line is in Section 14 of this tariff.*

*** *Carrier Common Line is in Section 12 of this tariff.*

**** *Special Access appears in Section 5 of this tariff.*

***** *Ordering options appear in Section 9 of this tariff.*

APPENDIX C: Filing Instructions and Pending Applications

TARIFF PAGES

LOCATION	*TRANSMITTAL LETTER*	*UNCHANGED ORIGINAL PGS & REVISED*	*REVISED PAGES ONLY*[2]	*61.38 REVISED COST SUPPORT*[1] *VOL. 1 (IF APPL)*	*ALL VOLUMES*
OFFICIAL COPIES					
SECRETARY OF F.C.C. ROOM 222	1	2[3]			
PUBLIC REFERENCE ROOM 513	1	1	1		1[4]
COMMERCIAL CONTRACTOR ITS-ROOM 330 (TRNG. RM.) OF BROWN BLDG 1220 19th ST. N. W.	1	1	1		1
COURTESY COPIES					
TARIFF DIVISION ROOM 514					
A. H. DAVID	1	1	1	1	
E. N. GOLD	1	1	1		1
J. A. NITSCHE	1	1	1	1	
R. L. SMITH	1	1	1	1	
D. F. GROSH	1	1			

1. In an effort to facilitate identification and cataloging we would appreciate the carriers doing the following:

A. Provide a list identifying all cost support volumes submitted with these revisions and associate it with the cost volumes *and* the transmittal letter.

B. Label the volumes of cost support on the spine of the binder with the name of the carrier, the volume number and the issue date of the revised filing. This may be done by marking with a felt pen and should be brief, ie: BELL OF PA, VOL 2-2, DATE.

C. All boxes in which cost support is delivered should be clearly labeled as to their contents. ie: BELL OF PA, TRANS. LTR XXX, DATE, VOLS. 1,2,3,4, BOX 1 OF 5.

2. The package of revised pages should be clearly labeled as such, ie: BELL OF PA, TRANS. LTR # XXX, DATE, REVISED TARIFF PAGES.

3. Each copy of these tariffs should be in a 3 ring, loose leaf binder clearly labeled on the spine of the binder. ie: BELL OF PA, TARIFF FCC NO. XX, ACCESS.

4. The cost support associated with Public Reference Copy should be delivered to E. N. Gold - Rm 514.

The following carriers have filed applications for Special Permission to make changes to their access tariffs.

Anchorage Telephone Utility Application #4, 1/23/83

Centel of Florida Application #2, 11/23/83

Centel of Illinois Application #2, 11/23/83

Centel of Minnesota Application #2, 11/23/83

Centel of Nevada Application #2, 11/23/83

Centel of North Carolina Application #3, 11/23/83

Centel of Ohio Application #2, 11/23/83

Centel of Texas Application #2, 11/23/83

Centel of Virginia Application #2, 11/23/83

East Ascension Application #1, 1/12/83

Great Plains Application #1, 11/2/83

GTE Service Corp. Application Nos. 6 and 7, 11/23/83

Matanuska Application #1

Merchants & Farmers Application #2 (Centel), 11/23/83

Cincinnati Bell Application Nos. 15 and 16, 12/22/83

New York Tel Application #45, 9/28/83 (life line waiver)

Pacific Bell Application #60, 9/28/83 (life line waiver)

Pacific Bell Application #63, 1/16/84 (requested withdrawal 2/2/84)

South Central Bell Application #18, 2/6/84 (add options under B&C)

Southern Bell Application #44, 2/6/84 (add options under B&C)

APPENDIX D: Section by Section Review

Appendix D contains a detailed, section-by-section review of numerous provisions of the ECA access and special construction tariffs. In this review, we set forth the language of numerous tariff provisions and discuss issues raised with respect to those provisions. We also give specific directions to the ECA for making needed changes in tariff language and other changes necessary to correct tariff deficiencies we have identified.

Our review of the ECA access tariff has revealed a rate problem that warrants discussion in this introduction. In several instances in Section 6, Switched Access Service, and numerous instances in Section 7, Special Access Service, the rates for service elements are not set forth in the tariff.[1] Rather, they are to be established on an "individual case basis" (ICB), - that is, developed based on the circumstances in each case. Because the ICB rates apply primarily to service elements not previously offered by telcos, we recognize that it will take some time for them to develop rates for certain facilities offered under these elements. For this reason, we are allowing the ECA to use the ICB approach in this filing. However, as the telcos develop rates or generally applicable regulations for these facilities we expect those rates and regulations to be set forth in the ECA access tariff.

[1] See, *e.g.* rates for Switched Access Service Local Transport optional features (Section 6.8.2(B)) and rates for Special Access Service Access Connections and Special Transport for Group, Supergroup and Mastergroup facilities (Section 7.5.1).

Section 1. Application of Tariff, and Section 2. General Regulations

Section 1 of the ECA tariff describes the applicability of the tariff, providing generally that its regulations, rates and charges are in addition to applicable regulations, rates and charges specified in other tariffs and referenced therein. Section 2 contains the general rules, regulations and procedures for the provision of access services. It includes provisions for installation and termination of service, refusal and discontinuance of service, and interference or impairment of telco facilities or equipment. Section 2 also provides for "Obligations of the IC," including payment arrangements, deposits, credit allowances for service interruptions, jurisdictional reporting requirements and trouble determination responsibilities. Finally, this section includes detailed provisions for connections of IC equipment and systems to telco facilities, and contains numerous definitions used throughout the tariff.

The Commission's access charge plan is generally consistent with the goals of the *Modification of Final Judgment* (MFJ) in seeking to eliminate any unjustified disparities in interconnection regulations so that all interexchange and information service providers will be able to compete on an equal basis, and so that any person, whether a carrier or end user, may be able to obtain access service under this tariff. In order to reach these goals within the next few years, the access charge plan establishes a phase-in period to facilitate the transition to "equal access." The Commission has made clear its intent that tariff provisions in effect during, as well as after, this transition period must avoid any unjustified discrimination among access service customers, and any unnecessary restrictions in competitive market areas, such as provision of equipment, or in provision of interstate/intra-LATA toll service, where local telephone companies may be competing with others. It is, therefore, particularly important that general provisions in the tariffs be reasonable and precise, and that definitions be clear. To this end, we are directing modifications and clarifications in Sections 1 and 2.

Many objections were raised to vague and ambiguous terms and provisions throughout Section 2, which commenters claim will fail to notify customers adequately of the provisions which will apply to them, and/or will allow the telco unreasonable discretion in their application. One important area of confusion stemmed from the nomenclature developed to identify the various customers under this tariff. The ECA developed a new term "Interstate Customer (IC)" to refer apparently to all customers of access service, both interexchange carriers and end users. In many places throughout the tariff, however, the tariff appears to treat "Interstate Customers" and end users as two distinct groups. The tariff also appears to use the term IC in many instances where it actually

intends only interchange carrier. The historical application of the acronym "IC" to represent interexchange carriers castes further confusion on these terms. We shall eliminate this ambiguity by prescribing the use of the terms used in our Access Charge proceedings, *i.e.*, interexchange carrier (IC), end user, and the term "customer" for any person who subscribes to access service under these tariffs. We have also directed clarifications of numerous other ambiguous terms and provisions in Section 2, particularly certain important definitions in Section 2.6.

Several commenters raised concerns regarding tariff provisions which they claim impose unreasonable burdens on the ICs. Some commenters urge that the Section 2.3.14 and 2.3.15 provisions for jurisdictional reporting requirements of the distribution of interstate and intrastate uses of access service would impose unreasonable administrative burdens on ICs, most of whom will lack the technical ability to develop adequate reports. Further, the commenters objected to the Section 2.3.15 provision for unilateral auditing of the IC's support data by the telco as unreasonable and anticompetitive. We are also concerned that the proposed reporting requirements may be unreasonable and intrusive. Moreover, in light of the move in our *Second Reconsideration Order* from a usage based rate to a flat rate for OCC lines telcos may wish to reconsider these usage reporting requirements. Accordingly, we will consider additional proposals by the exchange carriers for allocating their customers' intrastate and interstate usages.

We are also concerned about the reasonableness of several other provisions in Section 2. For example, we have concluded that the Section 2.3.16 provision for a 24-hour minimum service interruption for a credit allowance is unreasonable, particularly in light of substantial revenues which ICs could lose during service interruptions for that length of time. Accordingly, we are prescribing a shorter minimum service interruption period in that provision.

Certain aspects of the proposed deposit and interest penalty provisions in Section 2.4.1 drew complaints from several commenters. Commenters are concerned generally about the telco's discretion to determine when a deposit would be required, the size of the deposit, and the differences in interest proposed to be paid on the deposits and that to be collected on late payments. We are directing clarification and justification of the types and amount of deposits which may be required by the telco. In order to assure reasonable interest provisions, we are also directing that, within the bounds of relevant state laws, interest paid on customer deposits must be keyed to penalty interest charges to customers unless specifically justified.

We have two general concerns regarding the proposed connection provisions in Section 2.5. First, the provisions, many of which paraphrase

Part 68 provisions, could result in substantial confusion regarding the application of our Part 68 rules. Second, this section appears to propose establishment of Part 68-like connection regulations for equipment and systems not today subject to Part 68 of our Rules (i.e., for interconnection of carriers' facilities for through service). The telcos have not demonstrated a new potential for harm which would justify such an expansion of the scope of Part 68, and in our view any such expansion would not only be improper, but it would also be undesirable in that it might foreclose flexibility by carriers in implementing interconnection.

We have initiated a rulemaking proceeding which addresses, *inter alia,* tariff requirements governing carrier-to-carrier interconnection.[1] Pending resolution of that proceeding, we conclude that tariff provisions which previously governed interconnection of customers' and carriers' equipment and facilities in the interstate tariffs should continue in effect. Restatements in Section 2.5 of Part 68 rules for interconnection of non-carriers' equipment and facilities are confusing or unnecessary. Thus, the differentiation in previous tariffs may continue to be employed in view of our establishment herein of the separate "customer," "interexchange carrier" and "end user" categories.

We are directing changes in various other tariff provisions in Sections 1 and 2 of the ECA tariff, as indicated in the following pages. Sections 1 and 2 were largely unaffected by the Commission's *Second Reconsideration Order,* and, thus, changes in these sections required as a result of that decision should be minimal.

SUBJECT: Reference to Technical Publications

ECA TARIFF REFERENCE: p. 19

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"REFERENCE TO TECHNICAL PUBLICATIONS

The following technical publications are referenced in this tariff and may be obtained from Publishers' Data Center, Inc., P.O. Box C738 Pratt Street Station, Brooklyn, N.Y. 11205:

Compatibility Bulletin 106, Issue 2
Issued: December, 1981 Available: March 11, 1982

Technical Reference:
PUB 41451
Issued: January, 1983; Available: May 17, 1983

[1] MTS and WATS Market Structure, Phase III, Notice of Proposed Rulemaking, CC Docket No. 78-72, FCC 83-178, released May 31, 1983.

PUB 60101
Issued: December, 1982; Available: January 17, 1983"

DISCUSSION: The BOCs/CSO have proposed to add the following two references to this section:

PUB 62411
Issued: August, 1983; Available: August 23, 1983

PUB 62310
Issued: September, 1983; Available: September 16, 1983

We are concerned that even with these proposed additions there is still inadequate referencing of technical publications. The list must be expanded to include all other relevant publications currently listed in AT&T's Tariffs F.C.C. Nos. 259, 260, 263, 266, 268, 270, 271 and 273. Further, the list should include any references applicable to interconnection requirements for services not previously covered, such as HC1C-4.

This section must also conform to the conditions regarding these publications specified in the Bureau's Memorandum Opinion and Order regarding Transmittal No. 14268, released June 22, 1983 (Mimeo No. 4842) and its Memorandum Opinion and Order regarding Transmittal No. 14346. released September 8, 1983 (Mimeo No. 6295).

Further, the section should indicate that the status of publication 41451 is in question pending resolution of its applicability to Satellite Digital Service.

SUBJECT: Application of Tariff

ECA TARIFF REFERENCE: Section 1.3

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"The regulations, rates and charges contained herein are in addition to the applicable regulations, rates and charges specified in other tariffs of the Telephone Company which are referenced herein."

DISCUSSION: Section 61.74 of our Rules, 47 C.F.R. § 61.74, generally prohibits reference in a tariff to other documents outside the tariff in order to ensure that a tariff is a self-contained document which fully apprises the public of all information relevant to the service offered. Thus, the general reference in Section 1.3 to other regulations, rates and charges in other tariffs is improper and the provision must be deleted.

SUBJECT: General Regulations—Undertaking of the Telephone Company—Scope

ECA TARIFF REFERENCE: Section 2.1.1(A)

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"Services provided to an IC under the provisions of this tariff may be connected to facilities used by the IC between certain locations and thereby constitute a portion of an end-to-end interstate telecommunications service furnished by the IC for its own use or for the use of End Users."

ISSUES: MCI contends that the tariff unreasonably omits from Section 2.1.1(A) foreign communications services. MCI also refers to Section 2.3.14, which omits foreign communications from IC jurisdictional report provisions, and Section 2.6, which defines "interstate customer" without reference to foreign communications.

DISCUSSION: This provision generally states that the telco's services may be connected to an IC's facilities. We believe that it is unnecessary and confusing to state such permissive uses in tariffs. Unlimited lawful use of the services provided under a tariff is assumed absent justified restrictions in the tariff. This provision is unnecessary and must be deleted.

Accordingly, MCI's complaint regarding the omission of "foreign communications" in this section is moot. MCI does, however, raise this same issue in regard to the definition of "Interstate Communications" in Section 2.6. *See infra,* that section.

SUBJECT: General Regulations — Undertaking of the Telephone Company — Scope/ Maintenance and Testing

ECA TARIFF REFERENCE: Sections 2.1.1 (C) and (D)

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"(C) The Telephone Company shall be responsible only for the installation, operation and maintenance of its services. The responsibility of the Telephone Company shall be limited to the provision of services under this tariff and to the maintenance and operation of such services in a proper manner.

(D) The Telephone Company will for maintenance purposes, test its services only to the extent necessary to detect and/or clear troubles and will not perform a complete technical parameter verification when not deemed necessary by the Telephone Company."

ISSUES: MCI contends that Section 2.1.1(D) is vague and would accord the telephone company unreasonable discretion. The tariff should, MCI urges, define "Complete technical parameter" and the standard to be used by the telephone company in determining when this verification is "necessary."

DISCUSSION: The second sentence of Section 2.1.1(C) provides that the telco is responsible for maintaining its services "in a proper manner." This language is meaningless and unnecessary. Thus, the sentence should be deleted and subsection (C) should be modified to read as follows: "The Telephone Company shall be responsible only for the installation, operation and maintenance of the services which it provides."

Section 2.1.1(D) appears to allow the telco extremely broad discretion to determine when maintenance testing may be required. Proposed ECA modifications would delete the discussion regarding the technical parameter verification, and merely provide that the telco will test its services only to detect and/or clear troubles. The BOCs/CSO state that this change is appropriate because the provision regarding the technical parameter verification is unnecessary. The proposed modified language may appear in the revised tariffs filed in response to this order.

SUBJECT: General Regulations—Undertaking of the Telephone Company—Limitations on IC's Ability to Assign and Transfer Facilities

ECA TARIFF REFERENCE: Section 2.1.2(A)

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"(A) The IC may not assign or transfer the use of services provided under this tariff; however, where there is no interruption of use or relocation of the services, such assignment or transfer may be made to:

(1) another IC, whether an individual, partnership, association or corporation, provided the assignee or transferee assumes all outstanding indebtedness for such services, and the unexpired portion of the minimum period and the termination liability applicable to such services, if any; or

(2) a court-appointed receiver, trustee or other person acting pursuant to law in bankruptcy, receivership, reorganization, insolvency, liquidation or other similar proceedings, provided the assignee or transferee assumes the unexpired portion of the minimum period and the termination liability applicable to such services, if any.

In all cases of assignment or transfer, the written acknowledgement of the Telephone Company is required prior to such assignment or transfer which acknowledgement shall be made within 15 days from the receipt of notification. All regulations and conditions contained in this tariff shall apply to such assignee or transferee.

The assignment or transfer of services does not relieve or discharge the assignor or transferor from remaining jointly or severally liable with the assignee or transferee for any obligations existing at the time of the assignment or transfer."

DISCUSSION: This provision's use of the term IC should be corrected to correspond with our clarifications of the definitions of "IC" and "customers", *see infra,* those discussions in Section 2.6. Accordingly, the term "IC" in this section must be changed to "customer."

SUBJECT: General Regulations—Undertaking of the Telephone Company—Limitations—Shortage of Facilities

ECA TARIFF REFERENCE: Section 2.1.2(C)

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"(C) Subject to compliance with the rules mentioned in (B) preceding, where a shortage of facilities or equipment exists at any time, either for temporary or protracted periods, the services offered herein will be provided to ICs on a first-come, first-served basis."

ISSUES: MCI contends that this provision is ambiguous because it uses vague terms, such as "shortage" and "first-come, first-served."

DISCUSSION: As MCI points out, the provision purports to resolve how limited services and facilities will be allocated, but fails to clearly identify what will constitute a "shortage" which will trigger the "first-come, first-served" rules. These terms will be significant during the period following divestiture where ICs may be competing for limited facilities or equipment. These terms must be defined clearly enough for customers to plan for, and respond to, such shortage problems. The definitions should clearly address both facilities and equipment shortfalls, and specify how the exchange carrier will determine how a rationing system will be fairly determined.

SUBJECT: General Regulations — Undertaking of the Telephone Company — Limitations on Liability

ECA TARIFF REFERENCE: Sections 2.1.3(B) and (C)

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"(B) No carrier furnishing a portion of a service shall be liable for any act or omission of any other carrier furnishing a portion of that service.

(C) The Telephone Company is not liable for damages associated with service or facilities which it does not furnish."

DISCUSSION: Subsection (B) purports to address carrier liability. We believe that since the term "carrier" includes both those customers of the telco who are carriers, and the telco itself, this provision to limit liability is unnecessarily broad. This section should address only the issue of liability in terms of the telco. Further, subsection (C) would shield the telco from liability for services or "facilities which it does not furnish." The provision's use of the term "furnish" is unclear in the context of facilities which the telco may lease from others to provide its services. Thus, we conclude that Section 2.1.3 (B) and (C) should be deleted and the following language should be substituted:

"The Telephone Company shall not be liable for any act or omission of any other carrier or customer providing a portion of a service, nor shall the Telephone Company for its own act or omission hold liable any other carrier or customer providing a portion of a service."

SUBJECT: General Regulations—Undertaking of the Telephone Company—Liability

ECA TARIFF REFERENCE: Sections 2.1.3(E) and (F)

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs, *cf.*, Southwestern Bell §§ 2.13(E) and (F).

TARIFF LANGUAGE:

"(E) The Telephone Company shall be indemnified, defended and held harmless by the End User against any claim, loss or damage arising from the use of services offered under this tariff, involving:

(1) Claims for libel, slander, invasion of privacy, or infringement of copyright arising from any communications;

(2) Claims for patent infringement arising from combining or using the service furnished by the Telephone Company in connection with facilities or equipment furnished by the IC or End User or;

(3) All other claims arising out of any act or omission of the End User in the course of using services provided pursuant to this tariff.

(F) The Telephone Company does not guarantee or make any warranty with respect to its services when used in an explosive atmosphere. The Telephone Company shall be indemnified, defended and held harmless by the IC or End User from any and all claims by any person relating to the services provided."

ISSUE: MCI contends that the provision is unreasonably vague in violation of Sections 61.55(f) and (g) of our Rules, 47 C.F.R. Sections 61.55(f) and (g), and could be interpreted as requiring an IC to indemnify the telco for acts or omissions of an end user over which the IC has no control. The BOCs/CSO have responded that the instant provision is similar to that

contained in the OCC Facilities Tariffs*, and that the exchange carrier's liability is "appropriately" limited, particularly where the IC or end user is in a better position to minimize any damage or liability.

DISCUSSION: Section 2.1.3(E) seeks to limit the telco's liability by requiring the "End User" to indemnify, defend and hold harmless the telco against certain specified claims. As a result of the clarified definition of "end user" which we are mandating in this action, *see infra,* Section 2.6, we believe that this provision does not suffer from the vagueness problems which MCI alleges, and clearly would not apply by its terms to ICs, such as MCI, when providing service to their customers. By contrast, however, the analogous Southwestern Bell provision (Section 2.1.3(E)) specifically adds ICs, requiring the "IC or End User" to indemnify, defend and hold harmless the telcos for the claims listed in (1) and (2) and adds to subsection (3) claims arising out of any act or omission of the IC. This language, we believe, does have the vagueness problems which MCI has raised.

We also believe this provision in both the ECA and Southwestern Bell tariffs, among other tariffs, fails to distinguish clearly the respective obligations of the IC or end user. In order to eliminate these vagueness problems in both Section 2.1.3(E) and (F) the tariffs must contain separate provisions that clearly delineate the separate obligations of the IC and end user, holding neither responsible for the acts or omissions of the other.

SUBJECT: General Regulations—Undertaking of the Telephone Company—Provision of Services to ICs

ECA TARIFF REFERENCE: Section 2.1.4

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"The Telephone Company, to the extent that such services are or can be made available with reasonable effort, and after provision has been made for the Telephone Company's telephone exchange services, will provide to the IC upon reasonable notice services offered in other applicable sections of this tariff at rates and charges specified therein."

ISSUES: MCI contends that this section would create an unreasonable preference for local exchange service and exchange carriers over local access service and ICs.

DISCUSSION. At this time, we have no reason to believe that provisioning for the telephone exchange services will interfere with the exchange carriers' ability to provide adequate interstate access service nor have commenters specified any circumstances under which this provision would result in unreasonable discrimination against ICs. We are not persuaded, therefore, that this provision should be eliminated or revised.

SUBJECT: General Regulations—Undertaking of the Telephone Company—Installation and Termination of Services

ECA TARIFF REFERENCE: Section 2.1.5

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

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* These tariffs were filed subsequent to settlement agreements reached under CC Docket No. 20099, *Facilities for Use by Other Common Carriers,* 52 FCC 2d 727 (1975).

TARIFF LANGUAGE:

"The services provided under this tariff (A) will include any entrance cable or drop wiring and wire or intrabuilding network cable to that point where provision is made for termination of the Telephone Company's outside distribution network facilities at a location of minimum penetration inside of the IC terminal location or End User premises and (B) will be installed by the Telephone Company to such point of termination. This point of termination is defined as the Point of Interface at the IC terminal location and the Network Interface at the End User premises. Wire, required to extend the location of the interface from one location to another location within a building in order to extend Access Service facilities to the IC's or End User's premises equipment, will be provided, at the IC's or End User's request, on a time sensitive charge basis. The labor rates for the installation of such wires are the same as those set forth in 13.2.6(C) following for Other Labor."

ISSUES: Western Union contends that this provision is unreasonably restrictive insofar as it limits interconnection between the telco and the IC solely to the IC's premises.

DISCUSSION: We are concerned that this provision is ambiguous and uses unnecessary and confusing terminology. The section provides for the installation of cable or wire to a "point of termination." The section then defines that point of termination as the "Point of Interface at the IC terminal location and the Network Interface at the End User premises." Although it is unclear what is meant by these various terms, this section appears to restrict interconnection to these locations, without any justification. Further, no justification has been provided for differentiating between IC's and end users in this context. Therefore, we are directing that reference to "IC terminal location" and "end user premises" be consolidated here and throughout the tariff into the single term "premises." Similarly, "Point of Interface" and "Network Interface" should be consolidated into the single term "Point of Termination." *See infra*, the definitions for these new terms, Section 2.6.

This section also indicates that the telco's facilities will terminate at "a location of minimum penetration" inside the customer's premises. Section 68.215 of our Rules and the outcome of CC Docket 81-216 may have some bearing on this matter. Therefore, the term "suitable location" should be used in this provision for the present.

Accordingly, Section 2.1.5 must be modified to read as follows:

"The services provided under this tariff (A) will include any entrance cable or drop wiring and wire or intrabuilding cable to that point where provision is made for termination of the Telephone Company's outside distribution network facilities at a suitable location inside a customer-designated premises and (B) will be installed by the Telephone Company to such Point of Termination. Wire required within a building to extend Access Service facilities will be provided, at the Customer's request, on a time sensitive charge basis. The labor rates for the installation of such wire are the same as those set forth in 13.2.6(C) following for Other Labor."

SUBJECT: General Regulations—Undertaking of the Telephone Company—Maintenance of Services

ECA TARIFF REFERENCE: Section 2.1.6

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"The services provided under this tariff shall be maintained by the Telephone Company. The IC or others may not rearrange, move, disconnect, remove or attempt to repair any facilities provided by the Telephone Company except with the written consent of the

Telephone Company. The IC shall maintain all facilities provided by it. The Telephone Company shall not be responsible to End Users for end-to-end service of which the services provided under this tariff are part."

DISCUSSION: This provision states generally that only the telco may connect, disconnect, rearrange, etc., any telco provided facilities. This provision should be rewritten to recognize that customers must be able to connect to the interface. Thus, the second sentence should read "The IC or others may not rearrange, move, disconnect, remove or attempt to repair any facilities provided by the Telephone Company, other than by connection or disconnection to any interface means used, except with the written consent of the Telephone Company."

The last two sentences purport to assign maintenance responsibility to the IC for its own facilities, and limit the telco's responsibility for services it does not provide. Such limitation is already provided for in Section 2.1.3(B), which states that no carrier providing a portion of a service shall be liable for any act or omission of any other carrier providing a portion of that service. Thus, the last two sentences of Section 2.1.6 are unnecessary and must be deleted.

SUBJECT: General Regulations—Undertaking of the Telephone Company—Changes and Substitutions

ECA TARIFF REFERENCE: Section 2.1.7

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"The Telephone Company may, where such action is reasonably required in the operation of its business, (A) substitute, change or rearrange any facilities used in providing service under this tariff, including but not limited to, (1) substitution of different metallic facilities, (2) substitution of carrier or derived facilities for metallic facilities used to provide other than metallic facilities and (3) substitution of metallic facilities for carrier or derived facilities used to provide other than metallic facilities, (B) change minimum protection criteria, (C) change operating or maintenance characteristics of facilities or (D) change operations or procedures of the Telephone Company. In case of any such substitution, change or rearrangement, the transmission parameters will be within the range as set forth in 6. and 7. following. The Telephone Company shall not be responsible if any such substitution, change or rearrangement renders any IC furnished services obsolete or requires modification or alternation thereof or otherwise affects their use or performance. If such substitution, change or rearrangement materially affects the operating characteristics of the facility, the IC will be given adequate notice in writing. Reasonable time will be allowed for any design and implementation required by the change in operating characteristics."

ISSUES: Commenters urge that language regarding notification to ICs in 2.1.7 is unreasonably vague. (AT&T, ACS). AT&T urges that notice, should be defined; ACS proposes one year's notice. The BOCs/CSO reply states that the provision is reasonable and a specific notice period is not practical because of the diverse nature of these types of changes.

DISCUSSION: This provision overlaps with existing provisions in Part 68 of our Rules for changes and substitutions of telco facilities and equipment which affect customer interconnection subject to Part 68. It is unnecessary and confusing to have these two separate sets of provisions. This provision should clarify that Section 2.1.7 complements existing regulations in Part 68.110(b) of our Rules. Accordingly, the following language must be inserted before the section: "Except as provided for equipment and systems subject to FCC Part 68 regulations at 47 C.F.R, § 68.110(b), ..."

Commenters are concerned that the language in this section is unreasonably vague for an IC's purposes, and some urge that specific notice periods should be established. We agree that for IC's the undefined provision of "adequate notice" does appear somewhat vague. We recognize that ICs must have sufficient time to be able to plan for telco changes which affect their operations; however, telcos must also be allowed to make reasonable changes on reasonable advance notice. We except that cooperative procedures will be developed to supplement this section, perhaps establishing definite notice periods for certain of the changes. Moreover, since the proposed section provides for "reasonable" notification, we intend to examine specific problems as they arise on a case by case basis until workable cooperative arrangements can be devised.

SUBJECT General Regulations—Discontinuance and Refusal of Services

ECA TARIFF REFERENCE: Sections 2.1.8(A) and (B)

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs, *cf.*, Southwestern Bell §§ 2.1.6(A) and (B).

TARIFF LANGUAGE:

2.1.8 Refusal and Discontinuance of Service

(Original)

(A) Unless the provisions of 2.2.2 (B) following apply, if the IC or End User fails to comply with the provisions of this tariff, including any payments to be made by it on the dates and times herein specified, the Telephone Company may, on ten (10) days written notice of noncompliance, refuse additional applications for service and/or refuse to complete any pending orders for service at any time thereafter. If the Telephone Company does not refuse additional applications for service on the date specified in the ten (10) days notice, and the IC's or End User's noncompliance continues, nothing contained herein shall preclude the Telephone Company's right to refuse additional applications for service without further notice.

(B) Unless the provisions of 2.2.2 (B) following apply, if the IC or End User fails to comply with the provisions of this tariff, including any payments to be made by it on the dates and time herein specified, the Telephone Company may, on a twenty (20) days written notice, discontinue the provision of the services involved at any time thereafter. In the case of such discontinuance, all applicable charges, including termination charges, shall become due. If the Telephone Company does not discontinue the provision of the services involved on the date specified in the twenty (20) day notice, and the IC's or End User's noncompliance continues, nothing contained herein shall preclude the Telephone Company's right to discontinue the provision of the services involved without further notice.

(CSO Proposed Modification)

(A) Unless the provisions of 2.2.2(B) or 2.5 following apply, if the IC or End User fails to comply with 2.1.6 preceding or 2.2.1, 2.2.3, 2.3.5, or 2.3.7 following or other significant provisions of this tariff, including, but not limited to, any payments to be made by it on the dates and times herein specified, any required information or written agreements necessary for the provision of service, and failure to comply with ordering or minimum quantity requirements, the Telephone Company may, on thirty (30) days written notice to the person designated by the IC to receive such notices of noncompliance, refuse additional applications for service and/or refuse to complete any pending orders for service at any time thereafter. If the Telephone Company does not refuse additional applications for service on the date specified in the thirty (30) day notice, and the IC's or End User's noncompliance continues,

nothing contained herein shall preclude the Telephone Company's right to refuse additional applications for service without further notice.

(B) Unless the provisions of 2.2.2(B) or 2.5 following apply, if the IC or End User fails to comply with 2.1.6 preceding or 2.2.1, 2.2.3, 2.3.5 or 2.3.7 following or other significant provisions of this tariff, including, but not limited to, any payments to be made by it on the dates and times herein specified, any required information or written agreements necessary for the provision of service, the Telephone Company may, on a thirty (30) days written notice, to the person designated by the IC to receive such notices, discontinue the provision of the services involved at any time thereafter. In the case of such discontinuance, all applicable charges, including termination charges, shall become due. If the Telephone Company does not discontinue the provision of the services involved on the date specified in the thirty (30) days notice, and the IC's or End User's noncompliance continues, nothing contained herein shall preclude the Telephone Company's right to discontinue the provision of the services involved without further notice.

ISSUES: MCI urges that these provisions for refusal and discontinuance are unreasonably broad, particularly given the potential for unintentional violation of one of the massive number of tariff provisions. Further, MCI contends that this section is unreasonably vague in that it could be interpreted as permitting refusal or discontinuance of an IC's service due to an end user's noncompliance, and vice versa.

DISCUSSION: Section 2.1.8(A) appears to allow the telco on ten days' written notice, to refuse additional (or pending) orders for service if the IC or end user fails to comply with any "significant" provision of the tariff. Further, if the telco does not so refuse, and the noncompliance continues, it may refuse additional applications without further notice. Similarly, Section 2.1.8(B) provides that upon 20 days' written notice, the telco may discontinue service to an IC or end user for any violation of the tariff.

As written these provisions could impose significant sanctions on ICs or end users for what might be quite insignificant violations of the tariff. We believe these provisions are so vague as to be unreasonable. The BOCs/CSO have proposed modifications to these sections which partially address our concerns, but further modifications are needed. The BOCs/CSO modifications make the following basic changes: they (1) add Section 2.5 provisions to the exemptions from this section; (2) list certain specific provisions which among others, will trigger refusal or discontinuance; and (3) provide for 30 days' written notice of noncompliance to a person designated by the IC, rather than 10 days for refusal, and 20 days for discontinuance, to an unspecified person. The BOCs/CSO suggest that the extended period provides reasonable time for ICs to convey their concerns to the telco, rendering unnecessary MCI's suggestion that a grievance process be established to resolve disputes.

We have some remaining concerns and comments regarding the proposed modifications. First, the modification merely cites some examples of what provisions are, among others, considered "significant." Thus, the modification, like the original language, fails to provide ICs adequate notice of when these provisions will be invoked. As MCI points out, comparable provisions of the ENFIA tariffs (BSOC Tariffs F.C.C. Nos. 8 and 9) provide for discontinuance only for violations of certain identified tariff provisions. We conclude that this provision for refusal and discontinuance must specifically identify each provision which is sufficiently significant to trigger this section. This list should consist only of major tariff provisions.

Second, as MCI has noted, the original provision was written in a manner that could be interpreted to permit discontinuance of an IC's service when the end user fails to comply with a provision, and discontinuance of an end user's service when an IC fails to comply with a

provision. Such results would be unreasonable. Sections 2.18(A) and (B) must be modified to clarify that ICs and end users are each responsible for their own violations.

Third, MCI has urged that notice in this section be provided by certified mail to a person designated by the IC. The BOCS/CSO have proposed in their reply that written notice will be delivered to a person designated by the IC; however, it believes certified mail is unnecessary. We disagree with this latter point and see no reason for failure to include this common business practice for providing verifiable notification. Therefore, the provision should include a requirement for certified mailing of all notification of refusal and/or discontinuance under this section.

Fourth, this provision refers in subsection (B) to certain "termination charges" which will become due if the telco discontinues service under this section. As discussed in Section 2.4.1(A), *infra*, we find this charge vague and unsupported. Accordingly, "termination charges" must be defined and supported, or eliminated from the tariff.

Finally, the reference to Section 2.5 in the proposal must be changed to correspond with the changes we have mandated in that section, *infra*.

The proposed modifications to Section 2.4.1(A) and (B) must be corrected according to the foregoing discussion.

SUBJECT: General Regulations—Quotation Charge

ECA TARIFF REFERENCE Section 2.1.9

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"Except as set forth in 10.7 following, a nonrecurring charge (USOC QPA) for the preparation of a quotation applies whenever an IC requests an estimate of rates and charges for any service for which the rates and charges are determined on an individual case basis prior to placing an order for service. The charge includes the costs associated with the development and preparation of the quotation. A bill for the quotation preparation will be rendered. The quotation is valid for 90 days and will identify all estimated costs associated with the provision of the facilities needed to satisfy the IC's service requirements. Within this 90 day period, if the IC orders the service as quoted and service is subsequently provided, the Quotation Charge will be credited to the IC's account. If the IC cancels the request for a quotation prior to its completion, the IC will be billed for the costs incurred, for quotation preparation, through the cancellation date."

ISSUES: AT&T contends that this provision must distinguish between "order of magnitude" quotes and firm quotes. Further, AT&T argues that a 90 day interval for order of magnitude quotes is unduly restrictive. *See also*, Section 10.7, *infra*.

DISCUSSION: AT&T has indicated in its comments that it has historically provided certain quotes (which it identifies as "order of magnitude" quotes) free of charge, while it has charged for "firm" quotes. AT&T suggests that this practice should be continued and that charges should only be imposed for firm quotes, and only where substantial effort is involved. In reply, the BOCs/CSO argue that any quote takes time and effort, and that AT&T's suggestion would open the door to potential discrimination.

This provision has significant vagueness and ambiguity problems. It purports to establish a quotation preparation charge, but fails either to define or to justify adequately such a charge. The application of a quotation charge to any particular customer would be subject to the unfettered discretion of the telco. For government requests, the telco would be free not to apply any quotation charge, and thus, would shift any costs to general revenue requirements. Similarly, where the telco does not apply separate charges for quotations and the customer declines to obtain the service, the telco would also be unable to recover directly any costs associated with preparing the quotations, *e.g.*, Pacific Telephone's tariff for the Summer Olympics and the Democratic National Convention. In these instances, such costs would also be shifted into the general revenue requirements. Moreover, in cases involving development of new offerings for one or more specific customers, this proposed tariff provision would allow telcos to include those costs in its general revenue requirement by averaging them under developmental expenses.

Accordingly, since these charges are both unclear and unsupported we conclude that the proposed provision must be deleted from the tariffs. The telcos may file a provision for quotation preparation charges in their 1985 access tariffs, but the filing should resolve the substantial concerns we have identified here.

SUBJECT: General Regulations—Undertaking of the Telephone Company—Limitation of Use of Metallic Facilities

ECA TARIFF REFERENCE: Section 2.1.10

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"Except for ground start, duplex (DX) and McCulloch-Loop (Alarm System) type signaling, metallic facilities shall not be used for ground return or split pair operation. Signals applied to the metallic facility shall be voice or sub-voice and shall conform to the limitations set forth in 2.5.10 following. . . ."

ISSUES: Commenters contend that limitations, on the use of metallic facilities are unreasonably restrictive. (AT&T, MCI). WU contends that this provision violates its contractual rights obtained as a result of a Memorandum of Understanding dated December 14, 1979, among AT&T, WU and various international record carriers (IRCs). In reply, the BOCs/CSO propose to delete the second sentence to remove the restriction to voice and sub-voice signals.

DISCUSSION: This section seeks to impose restrictions regarding the signals that may be transmitted and the electronics that may be used with metallic facilities. MCI has urged that the limitation of transmitting only voice and sub-voice signals is unduly restrictive and should be eliminated. In their proposed modifications filed December 22, 1983, the BOCs/CSO proposed to delete the voice/sub-voice limitation in response to MCI's concerns. Those changes may be filed in revised tariffs filed in response to this order.

AT&T's concern for this section, however, is broader. Like MCI, it argues that customers should be allowed to transmit any type of signal within the technical limitations set forth in § 2.5.10. AT&T further contends that the customers should be permitted to control the electronics that operate with the metallic facility, in the interest of encouraging technological advancement in this area. This section must conform to our longstanding policies prohibiting any unjustified tariff restrictions on customer use of facilities. (*See, Carterfone*, 13 FCC 2d 420, *recon.*, 14 FCC 2d 571 (1968).)

WU contends that this provision violates a Memorandum of Understanding among AT&T, WU and various other IRCs, regarding the electronics used which allows loop signaling on wire-pair facilities and allows continuation of ground return and split pair operation on inplace service until October 31, 1985. To the extent that this provision is inconsistent with existing contractual obligations, it is clearly unlawful, (*see, MCI Telecommunications Corp. v. F.C.C.*, 665 F.2d 1300 (D.C. Cir. 1981)) and must be deleted from the tariffs.

SUBJECT: General Regulations—Undertaking of the Telephone Company—Notification of Service-Affecting Activities

ECA TARIFF REFERENCES: Section 2.1.11

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"The Telephone Company intends to provide the IC timely notification of service-affecting activities."

ISSUES: Commenters urge that language regarding notification to ICs in 2.1.11 is unreasonably vague. (ACS, AT&T). AT&T urges that notice should be defined; ACS proposes one year's notice. The BOCs/CSO reply states that the provision is reasonable and a specific notice period is not practical because of the diverse nature of these activities.

DISCUSSION: Section 2.1.11 appears to provide a general notification provision for all service-affecting activities. Section 2.1.7, however, already provides for certain notification requirements. The relationship between these two sections must be clarified. Further, vague language such as "*intends* to provide" must be clarified.

SUBJECT: General Regulations—Undertaking of the Telephone Company—Provision and Ownership of Telephone Numbers

ECA TARIFF REFERENCE: Section 2.1.13

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"The IC and the End User have no property rights to telephone number assignments or any other call number designations associated with Access Services. The Telephone Company reserves the right to assign, designate or change such numbers, or the Telephone Company serving central office prefixes associated with such numbers, when reasonably necessary in the conduct of its business."

ISSUES: The commenters urge that the ICs will have made substantial investments in customer awareness of their telephone numbers, and that it would be unreasonable to allow the telephone company unilateral authority to make these changes. (MCI, WU).

DISCUSSION: We find this provision so broad and vague that it would accord the telco unrestricted discretion to change its customers' number assignments. Customers may have significant financial interests in the stability of these assignments. In particular, "access codes" represent the basic "business address" of ICs. We also find that the first sentence of this provision, which provides that customers have no "property rights" in these number assignments is gratuitous. For these reasons we find that the entire provision must be deleted. If the local telcos wish to file a provision reserving a reasonable right to change number assignments in their revised tariff filings, they should include a provision for

reasonable advance notice in writing to the customer, and that such notice will be accompanied by an explanation of the reasons for such changes.

SUBJECT: General Regulations—Use—Purpose

ECA TARIFF REFERENCE: Section 2.2.1(A)

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"(A) Services provided under this tariff shall be used by the IC for its own use or in furnishing its authorized interstate services to End Users and for operational purposes directly related to the furnishing of the IC's authorized services. Operational purposes include testing and maintenance of circuits, demonstration and experimental services and spare services. Telephone Exchange Services required by the IC for its administrative use are furnished under other applicable tariffs of the Telephone Company."

ISSUES: MCI contends that the use restrictions in Section 2.2.1(A) are unlawful. It further argues that the use of the term "authorized" creates an ambiguity in the tariff by duplicating the tariff's prohibitions against unlawful use in Section 2.2.3. TNI argues that the last sentence in this section is unreasonably vague. The BOCs/CSO reply contends that the standard cited by MCI applies to equipment, not services, that an IC cannot routinely introduce new services without advance warning or examination, and that the section is similar to that in the current OCC Facilities Tariffs.

DISCUSSION: This subsection seeks to define the customer's use of the services obtained under this tariff. The first apparent limitation is that the IC's interstate services must be "authorized." The second apparent limitation is that only use for operational purposes directly related to an interexchange carrier's services to end users falls under this tariff while "administrative uses" fall "under other applicable tariffs." We believe these two limitations are not only unclear but, more importantly, are improper. As MCI points out, the Commission has made clear its general policy that customers may use a common carrier's services or facilities as they choose as long as the use (1) is lawful, (2) will not harm the network and (3) is not otherwise publicly detrimental.

Contrary to the position of the BOCs/CSO reply, the same principle applies to restrictions on use of services as well as to connection of equipment. *See, e.g., Resale and Shared Use Decision*, 60 FCC 2d 261 (1976), *recon.*, 62 FCC 2d 588 (1977), *aff'd sub nom., AT&T v. FCC*, 572 F2d 17 (2d Cir. 1977), *cert. denied*, 439 U.S. 875 (1978). In the present case no public harm appears or is urged that would justify the proposed use restrictions. The existing language in the OCC Facilities Tariffs also predates our decisions promoting full competition in the MTS/WATS market and appears to reflect market divisions which are now obsolete and unlawful. Thus, the proposed limitations must be deleted from this provision. Further, the only provision remaining in this section after this correction (*i.e.*, the last sentence) is either self-evident (if intended to permit ICs to obtain exchange service) or incorrect (if intended to require that ICs may not use service obtained under the access tariff for administrative uses). For these reasons, we conclude that Section 2.2.1(A) should be deleted.

SUBJECT: General Regulations—Use—Purpose

ECA TARIFF REFERENCE: Section 2.2.1(B)

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"(B) Where facility conditions permit, the IC may use the entire transmission capability of a service provided under this tariff as a single channel or create additional communication channels within or below the voice frequency band, except that the IC may not create additional communication channels from video cable facilities or audio facilities other than diplexing associated audio signals on the video cable facility. The Telephone Company does not warrant that its facilities and services meet standards other than those set forth in this tariff."

ISSUES: Commenters contend that the limitation on creation of additional channels from video cable or audio facilities is unreasonable. (MCI, WU). MCI also asserts that the phrase "where facility conditions permit" is ambiguous in violation of section 61.55(f) of our Rules.

DISCUSSION: This section allows multiplexing within or below the voice frequency band, but prohibits multiplexing of video cable or audio facilities. As in Section 2.2.1(A), we believe the restrictions in this subsection are inconsistent with clearly articulated Commission policies on restricted use of facilities. As long as the IC's use of the facilities is lawful, does not harm the network or is not otherwise publicly detrimental (and such does not appear to be the case here) this restriction is unreasonable. Accordingly, the first sentence in Section 2.2.1(B) must be deleted. The second sentence, which clarifies that the telco does not warrant that its facilities and services meet standards other than those established in the tariff, appears unnecessary, but if it is to be included in the tariff should appear as a new subsection under Section 2.1, which provides generally for the telco's responsibilities.

SUBJECT: General Regulations—Use—Interference or Impairment

ECA TARIFF REFERENCE: Section 2.2.2(B)

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"(B) If such characteristics or methods of operation are not in accordance with (A) preceding, the Telephone Company will, where practicable, notify the IC or End User that temporary discontinuance of the use of a service may be required; however, where prior notice is not practicable, nothing contained herein shall be deemed to preclude the Telephone Company's right to temporarily discontinue forthwith the use of a service if such action is reasonable under the circumstances. In case of such temporary discontinuance, the IC or End User will be promptly notified and afforded the opportunity to correct the condition which gave rise to the temporary discontinuance. During such period of temporary discontinuance, credit allowance for service interruptions as set forth in 2.4.4 following is not applicable."

ISSUES: MCI contends that the provision is unreasonably vague.

DISCUSSION: This provision overlaps with existing provisions for handling harm to the telco network in Section 68.108 of our Rules. It is unnecessary and confusing to have two separate provisions for handling harm to the network from equipment subject to Part 68. This provision should clarify that Section 2.2.2(B) complements existing regulations in Part 68.108. Thus, Section 2.2.2(B) must begin "(B) Except as provided for equipment or systems subject to the FCC Part 68 rules in 47 C.F.R. § 68.108, ..."

SUBJECT: General Regulations—Obligations of the IC—Damages

ECA TARIFF REFERENCE: Section 2.3.1

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"The IC shall reimburse the Telephone Company for damages to Telephone Company facilities utilized to provide services under this tariff caused by the negligence or willful act of the IC or an End User while using the services of the IC, or resulting from improper use of the Telephone Company facilities, or due to malfunction of any facilities or equipment provided by other than the Telephone Company. The Telephone Company will, upon reimbursement for damages, cooperate with the IC in prosecuting a claim against the person causing such damage and the IC shall be subrogated to the right of recovery by the Telephone Company for the damages to the extent of such payment."

ISSUES: MCI asserts that this provision is unreasonable in its application, in that it would, in certain instances, make the IC responsible for the acts of its end user customers.

DISCUSSION: This section would require the IC to reimburse the telco for damage to telco facilities caused by the negligence or willful act of the IC or end user. In the context of switched access service, in which the end user is a customer of both the IC and the telco, this provision appears to hold the IC liable for acts of persons over which it has no more control than the telco. The BOCs/CSO reply urges that whatever legal bond exists in these situations exists between the IC and its end user, and not between the telco and the IC's end users. The reply suggests that the IC could protect itself with similar provisions.

We are not persuaded that the IC will have any greater legal bond with its end user than the telco, at least in the case of switched access service. Indeed, the telephone company-end user bond may be stronger since end users ordinarily will have little choice but to do business with the local telco. Thus, we find it unreasonable to hold an IC liable for its end user's acts or omissions. Therefore, the references to IC reimbursement for negligent and willful actions of end users must be deleted from Section 2.3.1.

SUBJECT: General Regulations—Obligations of the IC—Ownership of Facilities and Theft

ECA TARIFF REFERENCE: Section 2.3.2

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"Facilities utilized by the Telephone Company to provide service under the provisions of this tariff shall remain the property of the Telephone Company. Such facilities shall be returned to the Telephone Company by the IC or End User, whenever requested, within a reasonable period following the request in as good condition as reasonable wear will permit.

The IC shall reimburse the Telephone Company for any loss through theft of facilities utilized to provide services under this tariff at the IC terminal location or End User premises."

ISSUES: MCI argues that the provision unreasonably requires the IC to be responsible for theft at the end users' premises.

DISCUSSION: This section provides generally that telco facilities shall remain telco property and must be returned upon request. The provision would also require the IC to reimburse the telco for any theft of such facilities either at the "IC terminal location" or "end user premises." The BOCs/CSO assert here, as in Section 2.3.1, *supra*, that the "legal bond" between an IC and its end users warrants this result. We disagree. It would appear, rather, that the telephone company, whose lines connect with these end user facilities, will ordinarily have an equally close or even greater relationship to the end user. The IC has no control over

these end user facilities; there is no reason why it should be responsible for their theft *. Thus, the last sentence of this provision must be stricken from the tariff.

SUBJECT: General Regulations—Obligations of the IC—Equipment Space and Power

ECA TARIFF REFERENCE: Section 2.3.3

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"The IC shall furnish or arrange to have furnished to the Telephone Company, at no charge, equipment space and electrical power required by the Telephone Company to provide services under this tariff at the points of termination of such services. The selection of ac or dc power shall be mutually agreed to by the IC and the Telephone Company. The IC shall also make necessary arrangements in order that the Telephone Company will have access to such spaces at reasonable times for installing, testing, inspecting, repairing or removing Telephone Company services. Equipment space and power furnished or arranged to be furnished by the IC shall not be used in the provision of service to any other IC or End User."

ISSUES: Commenters contend that this provision unreasonably restricts provision, installation, repair, etc., of access service terminating equipment to the telco. (MCI, WU). MCI continues that this access "customers premises equipment" was de-tariffed under our *Computer II* decision. MCI further argues that prohibition against using the designated space and power in providing service to others is unreasonable.

DISCUSSION: This section requires ICs to provide space and power free of charge for telco equipment at the point of termination. It further requires the IC to make arrangements to allow the telco reasonable access to such space for installation, repair, etc. ICs are also prohibited from using this space or power in providing service to another IC or end user.

Commenters contend that this provision assumes that the telco will in each case place its equipment on the IC's premises. MCI argues that to the extent that this equipment is located on the customer's premises, the equipment is not part of a common carrier service under our *Computer II* decision* and may be provided by the IC, the telco or others on a non-tariffed basis. While our *Computer II* decision de-tariffed customer premises equipment, we do not believe that the provision is in conflict with that action. This provision is limited to equipment and space required by the telco to provide "services under this tariff." Since customer premises equipment is not provided under tariff as a result of our *Computer II* decision, we believe that the provision cannot be read to limit a customer's provision of customer premises equipment.

We are concerned, however, about the requirement in this provision that customers must make necessary arrangements for inspections by the telco. We believe that such broad provisions may be unreasonable and anticompetitive. Thus, the word "inspecting" should be deleted from the list in the third sentence of this section.

Finally, the last sentence of this section appears to be an unjustified restriction on a customer's provision of equipment space and power. This final sentence should, therefore, also be deleted.

SUBJECT: General Regulations—Obligations of the IC—Additional Facilities and Protective Apparatus

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* *See,* Amendment of Section 64.702 (Second Computer Inquiry) 77 FCC 2d 384 (1980) (Final Decision), *recon.*, 84 FCC 2d 50 (1980), *further recon.*, 88 FCC 2d 512 (1981), *aff'd sub nom.*, CCIA v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied,* U.S. (1983).

ECA TARIFF REFERENCE: Section 2.3.4

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"The IC shall bear the cost, if any, of such additional facilities or protective apparatus which, according to accepted telecommunications industry standards, are required to be installed because of the particular use or hazardous location of the services provided under this tariff. Rates and/or charges, if applicable, will be developed on an individual case basis and filed in 12. following.

DISCUSSION: We find this provision vague and ambiguous, particularly in its use of the meaningless phrases "accepted telecommunications industry standards" and "particular use." Moreover, we believe that it is unnecessary to state that a customer must bear the costs of the facilities that the customer must furnish under the tariff. For these reasons, we find that this provision should be deleted.

SUBJECT: General Regulations—Obligations of the IC—Inspection of Facilities and Protective Apparatus

ECA TARIFF REFERENCE: Section 2.3.5

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"The IC and End User shall allow the Telephone Company to inspect at reasonable times any facilities or equipment provided by other than the Telephone Company required in accordance with 2.3.4 preceding and 2.5 following which are associated with the services provided under this tariff to determine if such installation complies with such Telephone Company requirements."

ISSUES: RCA contends that this inspection provision is unreasonable.

DISCUSSION: This section would establish requirements that ICs and end users allow the telco to inspect non-telco facilities and protective apparatus required under the two specified tariff sections to assure proper installation. We believe that this inspection provision is clearly overbroad and unreasonable, particularly as applied to end users. Moreover, as RCA points out, such an inspection requirement could force ICs to disclose potentially competitively sensitive information to the telco. For these reasons, this provision must be deleted.

SUBJECT: General Regulations—Obligations of the IC—Design of IC Services

ECA TARIFF REFERENCE: Section 2.3.8

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"Subject to the provisions of 2.1.7 preceding, the IC shall be solely responsible, at its own expense, for the overall design of its services and for any redesigning or rearrangement of its services which may be required because of changes in facilities, operations or procedures of the Telephone Company, minimum protection criteria or operating or maintenance characteristics of the facilities."

DISCUSSION: This section holds the IC responsible for redesign costs necessitated by certain telco changes. In accordance with the clarified definitions of customers, ICs and end users, *see infra,* Section 2.6, this section must be modified to hold both ICs and end users responsible for their respective costs. There is no reasonable justification for restricting such costs solely to the ICs.

SUBJECT: General Regulations—Obligations of the IC—Contacts with IC Customers (End Users)

ECA TARIFF REFERENCE: Section 2.3.10

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"The IC shall be responsible for all contacts and arrangements with End Users concerning the provision and maintenance of, and the billing and collecting of charges for, the IC's services to End Users, except as set forth in 4, 8, 9 and 13 following, for End User Access service, Billing Service, Directory Assistance Service and Presubscription, respectively."

DISCUSSION: We find this provision unreasonably broad and ambiguous. It is unclear what is meant by "all contacts and arrangements." We further conclude that the provision is unnecessary. Therefore, the provision must be deleted.

SUBJECT: General Regulations—Obligations of the IC—Claims and Demands for Damages

ECA TARIFF REFERENCE: Section 2.3.11(C)

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"(C) The IC shall defend, indemnify and save harmless the Telephone Company from and against any suits, claims, losses or damages, including punitive damages, attorney fees and court costs by the IC or third persons arising out of the Telephone Company provision of Billing Analysis Service or any other service under this tariff at the request of the IC, including, but not limited to claims for libel, slander, invasion of privacy, conversion and trespass."

ISSUES: MCI contends that this provision is unreasonable because the IC has no control over the telco's acts in providing billing analysis, and the telco should bear any liability for such acts.

DISCUSSION: The BOCs/CSO have responded in their comments that the Billing Analysis Service is an expensive venture due to potential litigation costs. They argue that Section 2.3.11(C) is necessary to assure that exchange service customers do not bear these costs.

We see no reason why the telco should not bear the costs of the services it provides, nor why it should be able to shift liability to the IC simply because that liability might be expensive. Liability should follow responsibility. The provision should be deleted.

SUBJECT: General Regulations—Obligations of the IC—Notification of Service-Affecting Activities

ECA TARIFF REFERENCE: Section 2.3.12

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"The IC shall provide the Telephone Company timely notification of the following: planned or unplanned outages of IC facilities which will affect the Telephone Company's capability to provide adequate service for anticipated traffic volumes; facility failures within the IC network which will adversely impact upon the Telephone Company's capability to provide adequate service for anticipated traffic volumes; and, IC marketing activities designed to generate rapid or short-term increases in anticipated traffic volumes. This timely notification will enable the Telephone Company to administer its network as set forth in 6.5.1. following."

ISSUES: Commenters argue that notice of IC marketing activities is unreasonable and anticompetitive. (MCI, RCA). MCI also contends that notice of unplanned outages is impossible and, thus, unreasonable. The BOCs/CSO in their proposed modifications would delete the word "marketing."

DISCUSSION: This section would require the IC to provide "timely notification" of IC facility outages and failures and IC marketing activities designed to generate volume increases.

We are concerned that this provision is vague and overbroad. It applies vague standards, requiring notice when outages will "affect" or failure will "adversely impact" telco services. Under this language even the most minor change in a customer's usage pattern could be viewed as having an "effect" or "impact" on the network.

The provision would infringe on customers' operations without justification. No harm to the network has been shown to warrant these various notification requirements. We agree with MCI that notification of IC marketing activities appears particularly unreasonable. Since there is no attempt to quantify the types of marketing activities which would trigger notification, this provision could be viewed as requiring unnecessary advance disclosure of marketing activities on the part of ICs. As a practical matter we expect that carriers will work together to preserve the flow of service and, thus, will cooperate in providing the necessary notification without tariff language. Accordingly, we conclude that this provision should be deleted.

SUBJECT: General Regulations—Obligations of the IC—Jurisdictional Report Requirements

ECA TARIFF REFERENCE: Section 2.3.14(A) and (B)

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"(A) *Jurisdictional Reports*

(1) When the IC orders service for both interstate and intrastate use, the projected interstate percentage of use and intrastate percentage of use must be provided in whole numbers to the Telephone Company. These whole number percentages will be used by the Telephone Company to apportion the use and/or charges between interstate and intrastate until a revised report is received as set forth in (2) following.

(2) Effective on the first of January, April, July and October of each year the IC shall update the interstate and intrastate jurisdictional report. The IC shall forward to the Telephone Company, to be received no later than 15 days after the first of each month, a revised report showing the interstate and intrastate percentage of use for the past three months ending the last day of December, March, June and September, respectively, for each service arranged for interstate and intrastate use. The revised report will serve as the basis for the next three months billing and will be effective on the bill date for that service. No prorating or back billing will be done based on the report. If the IC does not supply the reports, the Telephone Company will assume the percentages to be the same as those

provided in the last quarterly report. For those cases in which a quarterly report has never been received from the IC, the Telephone Company will assume the percentages to be the same as those provided in the order for service as set forth in (1) preceding.

(B) *Maintenance of IC Records*

The IC shall maintain and retain for a minimum for one year, complete, detailed and accurate records, workpapers and backup documentation in form and substance to evidence the percentage data provided to the Telephone Company as set forth in (A) (1) and (2) preceding. All of the records, workpapers and backup documentation shall be made available during normal business hours, at the location named in the report, upon reasonable request by the Telephone Company in order to permit a review by the Telephone Company auditor or outside auditor under contract to the Telephone Company or an auditor of a federal or state regulatory commission. If the records, workpapers and backup documentation are not provided or are insufficient or not in accordance with the provisions of this paragraph, the percentages of interstate and intrastate service will be assumed by the Telephone Company to be the same as indicated in the last report received until the deficiencies are corrected and new reports, as required herein, are provided to the Telephone Company."

ISSUES: Commenters are concerned that Section 2.3.14(A) would impose unreasonable administrative burdens on ICs. (AT&T, SBS). Some contend that it will be impossible to comply with certain requirements and that they are, therefore, meaningless. (AT&T, WU). AT&T further suggests that the forecasting methodology in subsection (A) conflicts with the separations process, where usage is determined on a sampled basis. The BOCs/CSO have responded that the exchange carriers will examine the feasibility of sampling. MCI contends that this section unreasonably omits reference to "foreign communications."

Commenters assert that the unilateral auditing provision in Section 2.3.14(B) is unreasonable (MCI, LC, USTel, TSC/SI), and also anticompetitive because it would require ICs to disclose competitively sensitive information to the telcos (MCI, ASC).

DISCUSSION: This section requires each IC when it orders service to provide a projected estimate of its traffic split between the interstate and intrastate jurisdictions, to be used by the telco initially to apportion charges between jurisdictions. Subsequently, the IC must provide quarterly reports to the telco showing actual usage, which will, in turn, serve as a basis for the next quarter's billing.

Under our *Second Reconsideration Order* charges for OCC access under Feature Groups A and B were changed from a measured usage basis to a flat, per line basis. In light of this change to a flat rate we believe telcos may wish to consider alternatives to their Section 2.3.14 jurisdictional reporting of "usage." Moreover, we are troubled by certain aspects of this current proposal which may unduly burden ICs, most of whom will lack the technical ability to measure their usage. Some commenters suggest that such usage reporting would involve mere guesswork.

We are also particularly troubled by the intrusiveness of the accompanying provisions in Section 2.3.14(B), whereby the ICs would be required to maintain documentation of their jurisdictional reports for auditing by the telcos "upon reasonable request." For these reasons, we conclude that the proposed provisions in Section 2.3.14(A) and (B) should be deleted from the tariff and that the exchange carriers should develop new proposals for handling the allocation of interstate and intrastate use which are reasonable and not unduly intrusive.

Those proposals should recognize the technical limitations of usage measurement under Feature Groups A and B. We are concerned that usage reporting is not likely to be meaningful absent the reasonable ability to measure such usage. Further, those proposals should address how any access charges, state and federal, would be applied where lines are used for both interstate and intrastate services in order to assure no "double recovery" on those lines.

Finally, the carriers should consider alternatives to the present proposal suggested by certain commenters. AT&T suggests that absent actual usage data, the Commission should consider accepting a surrogate for actual usage, such as use of outgoing access minutes to determine the percentage of intrastate vs. interstate terminal access. SBS proposes that this reporting requirement should be waived until December 31, 1984, in order to provide OCCs sufficient time to develop the reporting capability. In fact, the BOCs/CSO have responded that the exchange carriers will examine the sampling approach.

SUBJECT: General Regulations—Obligations of the IC—Trouble Determinations

ECA TARIFF REFERENCE: Section 2.3.16

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"(A) The IC shall be responsible for receiving trouble reports from its end users and determining, by testing or other means, if the source of trouble is caused by the equipment or facilities provided by the IC, its end user, or by the Telephone Company.

(B) When more than one Telephone Company service is used to provide service to an IC, the IC is responsible for determining which service provided by the Telephone Company is causing the reported trouble.

(C) The IC shall be responsible for payment of Maintenance of Service Charges as set forth in 13.3.1 following when reporting trouble to the Telephone Company and the obligations in (A) and (B) are not met."

ISSUES: SBS contends that Section 2.3.16 unreasonably burdens the ICs with the costs of fault isolation activities.

DISCUSSION: Section 2.3.16 makes the IC responsible for receiving trouble reports from end users and determining, by testing or other means, if the trouble stems from equipment or facilities provided by the IC, end user or telco. When more than one telco service is involved in the end-to-end service the IC must determine which service is causing the problem. If the IC does not meet these obligations it is subject to the telco maintenance of service charges set out in Section 13.3.1.

As SBS urges, the establishment of a viable and reasonable end-to-end fault isolation and problem resolution system will be critically important in the post-divestiture multivendor setting. SBS suggests that cooperative testing, fault isolation and problem resolution by all service providers should be required by the access tariffs, and encouraged by the use of a government sponsored forum (such as the one established in the Docket 20099 Implementation Meetings) to include local exchange carriers, ICs and other interested parties.

SBS suggests that either each telco should be required to bear its own costs of end-to-end fault isolation activity, regardless of where the trouble is found, or the telephone company found to be at fault should pay the reasonable costs incurred by the ICs and other telcos in isolating the fault. SBS continues that where ATTCOM's embedded facilities provide a capability to isolate trouble on an end-to-end remote basis, the telcos must make the same capability available to other ICs.

The BOCs/CSO reply argues that the IC should be responsible for isolating a trouble into, or out of, its portion of the circuit. It argues that SBS provides no evidence for its implication that an exchange carrier would not "cooperate routinely" or that AT&T will receive preferential maintenance treatment. Further, it claims that Section 13.2.4 provides for testing and maintenance when more than one telephone company is involved. The BOCs/CSO argue that the charge merely reflects the cost of the work involved.

We have several concerns for this provision. First, we are concerned that it places unreasonable burdens on the IC to determine the source of all reported trouble. This is particularly troublesome since, as SBS alleges, the various well-established end-to-end fault isolation capabilities which AT&T has used pre-divestiture probably will continue to be available to AT&T Communications and the BOCs. The provision also has ambiguity problems because there may often be more than one IC involved in serving a single end user.

Our next concern regarding Section 2.3.16 arises from the proposed reimbursement scheme for services rendered by the various parties involved in responding to trouble reports. The provision as written requires the IC who calls upon the telco for fault isolation assistance to pay for the telephone company's costs if the trouble is not in telco service or facilities. If the problem is attributable to the telephone company, however, it will not pay the fault isolation costs of the IC or any other telco. Thus, this portion of the provision also appears unreasonably to shift responsibilities from the telco and to the ICs. We conclude that the ICs and telcos should develop cooperative procedures to receive, diagnose and repair trouble reports, and allocate reasonable costs.

To the extent possible, the procedures developed should be filed in the tariffs. Until such procedures can be developed, carriers should use existing arrangements for handling trouble reporting and response negotiated pursuant to CC Docket 20099. Section 2.3.16, however, for the reasons stated above, should be deleted.

SUBJECT: General Regulations—Payment Arrangements and Credit Allowances—Deposits

ECA TARIFF REFERENCE: Section 2.4.1(A)

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"(A) The Telephone Company may, in order to safeguard its interests, require an IC which has a proven history of late payments to the Telephone Company or does not have established credit with the Telephone Company except for an IC which is a successor of a company which has established credit with the Telephone Company and has no history of late payments to the Telephone Company, to make a deposit prior to or at any time after the provision of a service to the IC to be held by the Telephone Company as a guarantee of the payment of rates and charges. Such deposit may not exceed the actual or estimated rates and charges for the service for a two month period plus the amount of any termination charges attributable to the service. The fact that a deposit has been made in no way relieves the IC from complying with the Telephone Company's regulations as to advance payments as set forth in 5.4.3 following or the prompt payment of bills. At such time as the provision of the service to the IC is terminated, the amount of the deposit will be credited to the IC's account and any credit balance which may remain will be refunded. At the option of the Telephone Company, such a deposit may be refunded or credited to the IC's account when the IC has established credit or an acceptable record of payment at any time prior to the termination of the provision of the service to the IC. In case of a cash deposit, for the period the deposit is held by the Telephone Company, the IC will receive simple annual interest at the same percentage rate as that set forth for this purpose in the Telephone Company's Local o[n] (sic) General Exchange Service tariff. Should a deposit be credited to the IC's account, as indicated above, no interest will accrue on the deposit from the date such deposit is credited to the IC's account."

ISSUES: Commenters contend that the size of the deposit required is unreasonable and that this provision may be used in an anticompetitive manner against new ICs. (ACS, EMX). MCI urges that the deposit requirement must not unreasonably be extended to those with legitimate billing disputes. Commenters also assert that the provision for interest on deposits creates an unreasonable double standard in that it allows the telco to pay a lower rate on

deposits than the interest penalty it applies to late-payments by ICs (§ 2.4.1(B)(3)). (TSC/SI, US Tel). The BOCs/CSO have replied generally that requiring deposits is sound business practice and that the interest on deposits generally reflects rates paid at financial institutions. In response to MCI, the reply suggests that a deposit would properly be required of an IC which continually disputes bills which are usually resolved in the telco's favor.

DISCUSSION: Section 2.4.1(A) generally provides the telco with the authority to require a deposit from a carrier that either has a proven history of late payments to, or lacks established credit with, the telephone company and is not a successor of a company with such credit standing. Such deposit, which may be required prior to, or at any time after provision of service, may not exceed two months' charges plus "any termination charges" for the service.

The section provides that the deposit may be refunded or credited to the IC, at the telco's option when the IC establishes credit or an "acceptable record of payment." The deposit will receive simple annual interest at the rate set forth in the telco's Local or General Exchange Service tariff.*

We recognize that it is prudent for the telephone company to seek to avoid non-recoverable costs imposed by bad credit risks. The provisions in this section, however, have several flaws. First, the meaning of "termination charges," which will constitute a portion of the deposit, is unclear. It is impossible to determine from the access tariffs how these charges relate to other charges, *e.g.*, the Section 5.2.5(A) minimum period of service provision, and other charges required in Section 5, or the provisions for termination liabilities to recover special equipment costs. These vague charges could become extremely burdensome and must therefore, either be defined and supported or eliminated from the tariff.

Second, we are concerned about the potential anticompetitive effects of requiring a deposit from ICs which do not have "established credit with the Telephone Company." It appears that at the outset only ATTCOM will escape this deposit requirement since only it may have service history in all markets. While we recognize the need to assure reasonable customer credit ratings, we believe that it is unreasonably onerous to require that an IC establish credit with each telephone company. We believe that adequate bases for extending credit in most instances will arise from the ICs' dealings with other telephone companies or entities. Thus, we conclude that Section 2.4.1(A) must be amended to allow the telco to require deposits only from an "IC which has a proven history of late payments to the Telephone Company or does not have established credit except for an IC which is successor of a company which has established credit and has no history of late payments to the Telephone Company. . ."

Our third concern for Section 2.4.1(A) regards the interest to be provided on the ICs' deposits. As the commenters have noted, there is a double standard for simple interest paid by the telco on deposits in this section and the compounded interest penalty collected by the telco on late payments by ICs (Section 2.4.1(B)(3)(b)). Even with the reduced interest ceiling the BOCs/CSO have proposed in their reply comments, the differences between interest collected and interest paid would appear to range in the area of 10 to 19%. We find no justification for these differences. We conclude that fairness dictates an evenhanded approach to interest paid and collected by the telcos within the applicable state limitations. Thus, the differences between the interest on deposits in Section 2.4.1(A) and the interest penalty in Section 2.4.1(B) must be justified or eliminated.

Finally, we are concerned that this provision allows the telco unnecessarily broad discretion in determining when it will return or credit the deposit to a customer's account. Thus, we conclude that this provision should state that the telco will return or credit such a

* There is a typographical error in the next to the last sentence of § 2.4.1(A). The sentence should read ". . .the Telephone Company's Local or General Exchange Service tariff."

deposit to a customer's account after that customer has established a one-year prompt payment record.

SUBJECT: General Regulations—Payment Arrangements and Credit Allowances—Payment of Rates and Charges

ECA TARIFF REFERENCE: Section 2.4.1(B)(1)-(2)

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"(B) The Telephone Company shall bill on a current basis all charges incurred by and credits due to the IC under this tariff attributable to services established or discontinued during the preceding billing period. In addition, the Telephone Company shall bill in advance charges for all services to be provided during the ensuing billing period except for charges associated with service usage and for the Federal Government which will be billed in arrears. The bill day (i.e., the billing date of a bill for an End User or IC for Access Service under this tariff), the period of service each bill covers and the payment date will be as follows:

(1) For End User Service and Presubscription Service, the Telephone Company will establish a bill day each month for each end user account. The bill will cover End User Service and Presubscription Service charges for the ensuing billing period except for End User Service and Presubscription Service for the Federal Government which will be billed in arrears. Any known unbilled charges for prior periods and any known unbilled adjustments for prior periods for End User Service and Presubscription Service will be applied to this bill. Such bills are due when rendered.

(2) For Service other than End User Service and Presubscription Service, the Telephone Company will establish a bill day each month for each IC account. The bill will cover nonusage sensitive service charges for the ensuing billing period for which the bill is rendered, any known unbilled nonusage sensitive charges for prior periods and unbilled usage charges for the period after the last bill day thru the current bill day. Any known unbilled usage charges for prior periods and any known unbilled adjustments will be applied to this bill. Payment for such bills is due as set forth in (3) following. If payment is not received by the payment date, as set forth in (3) following in immediately available funds, a late payment penalty will apply as set forth in (3) following.

For bill days in January 1984, the bill will cover nonusage sensitive service charges for the ensuing billing period, the nonusage sensitive service charges for the period from January 1, 1984 thru the bill day, usage charges for the period from January 1, 1984 thru the bill day and any known adjustments for the calendar month of January 1984. Such bills are due as set forth in (3) following. If payment is not received on the payment date as set forth in (3) following in immediately available funds, a late payment penalty will apply as set forth in (3) following."

ISSUES: ARINC contends that the terms IC and end user are ambiguous in Section 2.4.1 as well as other sections throughout the tariff. The BOCs/CSO reply states that their definition of IC includes any entity ordering access service under these tariffs. The FEA argue that the provision is unjust and unreasonable because when the federal government deals with the telco through an IC, rather than directly, payment will be required in advance rather than arrears.

DISCUSSION: Sections 2.4.1(B)(1) and (2) set out certain payment arrangements for telco customers taking access service under this tariff. The provisions distinguish between End User and Presubscription Services and all other services. As ARINC points out, the use of the terms IC and end user in this section and throughout the tariff leads to significant

uncertainties as to how provisions apply to the various parties. In our discussion of the definitions of these terms, *infra*, we establish three distinct groups: "end user", "interexchange carriers" (ICs) and the generic group "customers". Section 2.4.1(B) must be amended, using our terminology to clarify that end users, as well as ICs, will be allowed directly to order and *pay* for access services from the telco.

This section provides that payment will be required of customers in advance of service, except for the federal government, which will be billed in arrears. The FEA contend that this provision is unreasonable because IC's which are attempting to meet service needs of the federal government should be able to obtain service on the same basis as the federal government. We are not persuaded by the FEA's argument. We find no legal or other basis to extend the billing advantages enjoyed by the federal government to other carriers. To the extent that billing the federal government in arrears is required by federal procurement or disbursement regulations or is established by law, it is not unreasonable to allow telcos to comply with such requirements. However, ICs providing service to the federal government are not entitled to the benefits of those laws or regulations providing for billing in arrears.

We also have concerns for this section's application of a late penalty if payment is not received "in immediately available funds." It is unclear from the tariff what is meant by this term, which appears several times in Section 2.4.1(B). The term must be defined or deleted.

Finally, referenced dates in this section must be corrected to correspond with the new effective dates of the tariff.

SUBJECT: General Regulations—Payment Arrangements and Credit Allowances—Payment Dates and Late Payment Penalties

ECA TARIFF REFERENCE: Section 2.4.1(B)(3)

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"(3)(a) All bills dated as set forth in (2) preceding for service, other than End User and Presubscription Service, provided to the IC by the Telephone Company are due 31 days (payment date) after the bill day or by the next bill date (i.e., same date in the following month as the bill date); whichever is the shortest interval, except as provided herein, and are payable in immediately available funds.

If such payment date would cause payment to be due on a Saturday, Sunday or Holiday (i.e., New Year's Day, Independence Day, Labor Day, Thanksgiving Day, Christmas Day, the second Tuesday in November and a day when Washington's Birthday, Memorial Day or Columbus Day is legally observed), payment for such bills will be due from the IC as follows:

If such payment date falls on a Sunday or a Holiday which is observed on a Monday, the payment date shall be the first non-Holiday day following such Sunday or Holiday. If such payment falls on a Saturday or on a Holiday which is observed on Tuesday, Wednesday, Thursday or Friday, the payment date shall be the last non-Holiday day preceding such Saturday or Holiday.

(b) Further, if any portion of the payment is received by the Telephone Company after the payment date as set forth in (a) preceding, or if any portion of the payment is received by the Telephone Company in funds which are not immediately available to the Telephone Company, then a late payment penalty shall be due to the Telephone Company. The late payment penalty shall be the portion of the payment not received by the payment date times a late factor. The late factor shall be the lesser of:

(I) the highest interest rate (in decimal value) which may be levied by law for commercial transactions, compounded daily for the number of days from the payment date to and including the date that the IC actually makes the payment to the Telephone Company, or

(II) 0.000657 per day, compounded daily for the number of days from the payment date to and including the date that the IC actually makes the payment to the Telephone Company.

(c) In the event that a billing dispute concerning any charges billed to the IC by the Telephone Company is resolved in favor of the Telephone Company, any payments withheld pending settlement of the dispute shall be subject to the late payment penalty set forth in (b) preceding. If the billing dispute is resolved in favor of the IC, no late payment penalty will apply to the disputed amount."

ISSUES: Commenters contend that the late payment charge (1) is unreasonably high (SBS, MCI, LC); (2) should not be applied to amounts in dispute (MCI, RCA); (3) discriminatorily applies only when disputes are resolved in favor of the telephone company, with no equivalent interest provision where resolution favors the IC (MCI, TSC/SI, ISACOMM and LC); and (4) discriminates against ICs in favor of end users who are not assessed these charges (LC). USTEL and SBS also argue that the payment period is unreasonably short.

DISCUSSION: Section 2.4.1(B)(3) provides a payment schedule for services provided to ICs. It further provides for a penalty for late payments and its application in billing dispute situations.

The commenters have raised several concerns regarding this section. Several parties claim that the late payment penalty is unreasonably high. In their reply comments the BOCs/CSO have proposed to lower the interest penalty ceiling from approximately a 27% effective annual rate to what they claim to be approximately 24%.* We have already mandated in Section 2.4.1(A), *supra,* that the discrepancy between the interest proposed to be paid on deposits and the interest penalty in this section be either justified or eliminated.

Additionally, commenters object to the proposal to apply the late payment penalty to amounts in dispute which are ultimately awarded to the telco. They charge that the penalty unreasonably offers the telco incentive to delay resolution of billing disputes and ultimately resolve them in its own favor. Commenters urge that the section should include a provision for interest paid to an IC when contested payments are resolved in favor of the IC. In reply, the BOCs/CSO have proposed such an interest provision for billing disputes which are resolved in the IC's favor and require more than 10 working days to settle. We believe that this proposed modification adequately addresses this matter. The proposed change in Section 2.4.1(B)(3) should be included in the revised tariffs filed to comply with this order.

SBS also raises concerns that OCCs will be unable to verify telephone company billing during early post-divestiture period within the 31 days alloted by this provision. SBS suggests a nine month waiver of late payment penalties during this start-up period to allow OCCs to adjust to new billing arrangements. In light of the Commission's action in our *Second Reconsideration Order,* which replaced the access minutes usage charges with flat rate charges, which will require no verification, this issue is now moot.

Finally, as we directed in Section 2.4.1(B)(1)&(2), *supra,* this section should clarify the meaning of the phrase "immediately available funds."

SUBJECT: General Regulations—Payment Arrangements and Credit Allowances—Minimum Periods

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* The ceiling proposed is "the portion of the payment not received by the payment date times a late factor." The BOCs/CSO reply would change this late factor from 0.000657 to 0.000590, compounded daily.

ECA TARIFF REFERENCE: Section 2.4.2

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"The minimum periods for which services are provided and for which rates and charges are applicable are as set forth in 5., 8. and 9. following for the services involved.

The minimum period for which service is provided and for which rates and charges are applicable for a Specialized Service or Arrangement provided on an individual case basis as set forth in 12. following, is one month unless a different minimum period is established with the individual case filing.

When service is discontinued prior to the expiration of the minimum period, charges are applicable for the remaining portion of the minimum period, whether the service is used or not, and will be based on the rates in effect for the service at the time of discontinuance."

DISCUSSION: Minimum periods for specific services are set forth in other sections of the tariff. Unless a different period is specified in the individual case, Section 2.4.2 provides a one month minimum period for a specialized service or arrangement provided on an individual case basis. Section 2.4.2 also provides that if a service is discontinued before the expiration of the minimum period, charges (based on the rate in effect at the time of discontinuance) will continue for the remaining portion of the minimum period whether or not the service is used.

We find that it is reasonable that the telco take steps to mitigate any losses due to discontinuance, particularly where the minimum service period is greater than one month, and thereby reduce the minimum period charges. We have historically allowed the use of a minimum service period of one month. Thus, the charges for discontinuance in this section must be modified to provide that discontinuances of service with a one month minimum period, the monthly minimum period charges will apply; in instances where the minimum period is greater than one month, however, the charge will be the lesser of the telco's non-recoverable costs for the discontinued service or the minimum period charges. The section should also cross-reference the provisions which establish the minimum period charges.

SUBJECT: General Regulations—Payment Arrangements and Credit Allowances—Credit Allowance for Service Interruptions

ECA TARIFF REFERENCE: Section 2.4.4

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"(A) *General*

A service is interrupted when it becomes unusable to the IC or End User because of a failure of a facility component used to furnish service under this tariff. An interruption period starts when an inoperative service is reported to the Telephone Company by the IC or End User and ends when the service is operative.

(B) *When a Credit Allowance Applies*

In case of an interruption to any service, allowance for the period of interruption, if not due to the negligence of the IC or End User, shall be as follows:

(1) For services, other than those mentioned in (2) and (6) following, no credit shall be allowed for an interruption of less than 24 hours. The IC or End User shall be credited for an interruption of 24 hours or more at the rate of 1/30 of the monthly charge for the service for

each period of 24 hours or major fraction thereof that the interruption continues from the time of notice to the Telephone Company that an interruption has occurred.

* * * * *

(5) For certain Special Access services (Wideband Digital, WD1-4; Digital Data Access, DA1-4; and High Capacity, HC1), any period during which the error performance is below that specified for the service will be considered as an interruption.

* * * * *

(C) *When a Credit Allowance Does Not Apply*

No credit allowance will be made for:

* * * * *

(3) Interruptions of a service during any period in which the Telephone Company is not afforded access to the premises where the service is terminated.

(4) Interruptions of a service during any period when the IC or End User has released a service to the Telephone Company for maintenance purposes, to make rearrangements, or for the implementation of an order for a change in the service.

* * * * *

(7) Interruptions caused by the failure of other Telephone Company provided services which are connected by the IC at its terminal location or by the end user at its premises.

* * * * *

ISSUES: Commenters contend that an 24 hour minimum interruption for credit allowances is unreasonable. (ACS, EMX and RCA). WU, in line with its comments on Section 2.3.3, argues that Section 2.4.4(C)(3) should not apply where the IC uses its own personnel to repair facilities. The BOCs/CSO counter that existing ENFIA tariffs provide for a 24 hour minimum interruption and that exchange carriers must be able to protect themselves from ICs who would abuse the credit allowance during dormant service periods.

DISCUSSION: Section 2.4.4(B)(1) states that, with certain exceptions, no credit allowance shall be given for access service interruptions of less than 24 hours. No justification has been offered for this minimum. This time period has been the standard for credit allowances in BOC exchange service tariffs, however, we do not believe that it can be reasonably applied to customers of access service who may be paying significant monthly charges, and may lose substantial revenues from service interruptions. ACS, RCA and EMX contend that current business practice generally allows for credit allowances for service interruptions of 30 minutes or more. Thirty minutes is also the minimum credit allowance period in AT&T's private line Tariff F.C.C. No. 270. Thus, in the interest of providing reasonable compensation to access service customers for lost revenues during telco "down time" and to provide incentives for swift maintenance and changes by the telco, we conclude that the 30 minute interruption minimum is reasonable for these services. Finally, the interruption period should be calculated from when the telephone company becomes aware of the inoperative service, regardless of when it receives a specific customer report. Section 2.4.4(B)(1) must be amended to reflect this discussion.

In their reply comments the BOCs/CSO propose to modify credit allowance provisions related to special access services, by deleting "Digital Data Access, DA1-4" and "High Capacity, HC1" from Section 2.4.4(B)(5). No rationale was provided for the proposed deletion and no parties have been allowed opportunity to comment. Thus, these proposals should appear as a separate tariff filing, with the appropriate justification.

Section 2.4.4(C)(3) states that service interruption credits will be forfeited whenever customers do not allow telco personnel access to the customer's premises. In line with the modifications WU seeks in § 2.3.3 establishing the customer's option to install and repair end-to-end interconnection facilities, it also seeks an exception to this provision where the customer itself performs the repair. Since Section 2.3.3 cannot be read as restricting a customer's right to provide customer premises equipment, we see no reason to modify Section 2.4.4(C)3, *see, supra,* Section 2.3.3.

Section 2.4.4(C)(4) states that credit allowances will not apply to service interruptions when the IC or end user releases a service to the telco for maintenance, rearrangements or changes. We are concerned that this provision is vague and open-ended, and provides no incentives for swift completion of these activities. The section must be modified to clarify when this provision will be triggered and to set forth reasonable time periods for completion of these telco activities.

Section 2.4.4(C)(7) disallows credit allowances for service interruptions caused by other telephone company services. It is clearly unreasonable to impose on IC's the costs of lost service caused by failure of the telco's other services. Section 2.4.4(C)(7) must be deleted.

SUBJECT: General Regulations—Payment Arrangements and Credit Allowances—Services Included in Netting

ECA TARIFF REFERENCE: Section 2.4.5

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"Payment for services obtained by an IC under the provisions of this tariff, except for services set forth in 3. following, and ECA Tariff F.C.C. No. 3 for Special Construction, when Billing Processing Service and/or Private Line Billing Service is provided by the Telephone Company to the IC, will be included in the netting of accounts receivable as set forth in 8.2.3 following when the IC has been notified by the Telephone Company."

DISCUSSION: This provision addresses certain telco billing procedures which are set forth in Section 8.2.3 of the tariff. This provision appears to duplicate those provisions while adding certain exceptions. The provisions contained in Section 2.4.5 must be deleted from Section 2 and incorporated into Section 8.2.3.

SUBJECT: General Regulations—Payment Arrangements and Credit Allowances—Title or Ownership Rights

ECA TARIFF REFERENCE: Section 2.4.7(B)

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"(B) Title or ownership rights to Specialized Service or Arrangements designed by the Telephone Company to meet an IC's or End User's request remain with the Telephone Company except as specifically provided for by written agreement of all parties."

DISCUSSION: We are concerned that the exception included in this provision is vague and standardless. The exception accords the telco unfettered discretion to determine which customers will be granted title or ownership rights and which will not. As a tariff provision conditioned on an event outside the tariff, it is meaningless, and cannot be allowed. Accordingly, this provision must be deleted.

SUBJECT: General Regulations—Payment Arrangements and Credit Allowances—Ordering, Rating and Billing of Access Service When More Than One Telephone Company is Involved

ECA TARIFF REFERENCE: Section 2.4.8

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"The Telephone Company will handle ordering, rating and billing of Access Services under this tariff where more than one Exchange Telephone Company is involved in the provision of Access Service as set forth in (A) or (B) following. The choice of either (A) or (B) shall be made by the Telephone Company and the Telephone Company will notify the IC which option will apply when the IC orders Access Service. The choice of (A) or (B) will be based on the interconnection arrangements between the two Exchange Telephone Companies involved.

(A) When an Access Service is ordered by an IC where one end of the Transport element (i.e., Special Transport, Local Transport or Directory Transport, as appropriate) is in one Exchange Telephone Company operating territory and the other end is in another Exchange Telephone Company operating territory, except for Access Services provided with the use of Hubs (multiplexing or bridging), the Exchange Telephone Company in whose territory the end user serving wire center is located will accept the order for the Access Service from the IC. That Exchange Telephone Company will then determine the charges involved, arrange to provide the Access Service ordered and bill the charges in accordance with its Access Service tariff.

When an Access Service provided with the use of a Hub (multiplexing or bridging) is ordered by an IC, the Exchange Telephone Company in whose territory the Hub is located will accept the order for the Access Service ordered and bill the charges in accordance with its Access Service tariff.

(B) When an Access Service is ordered by an IC where one end of the Transport element (i.e., Special Transport, Local Transport, or Directory Transport, as appropriate) is in one Exchange Telephone Company operating territory and the other end is in another Exchange Telephone Company operating territory, both Exchange Telephone Companies will accept the order for the Access Service from the IC. Each Exchange Telephone Company will provide its portion of the Transport element from the serving wire center in its operating territory to a border interconnection point with the other Exchange Telephone Company. Each Exchange Telephone Company will determine the charges involved for its portion of the Access Service ordered and will bill such charges in accordance with its Access Service tariff. Title page not withstanding, the mileage used to determine the Transport element will be the mileage measured from the serving wire center in the first Exchange Telephone Company operating territory to the serving wire center in the second Exchange Telephone Company operating territory. The rate for the transport element will be the rate in each exchange Telephone Company's tariff for the mile band for the mileage measured as set forth in the preceding sentence. Each Exchange Telephone Company's charge for the Transport element will be the product of the Exchange Telephone Company's mile band rate and the mileage measured for the two serving wire centers multiplied by the mileage from the Exchange Telephone Company's serving wire center to the border interconnection point and divided by the sum of the mileage from the first Telephone Company serving wire center to the border interconnection point and the mileage from the second Telephone Company serving wire center to the border interconnection point. All other appropriate charges in each Exchange Telephone Company's tariff are applicable."

ISSUES: MCI contends that Section 2.4.8 violates Section 203 of the Act because an IC cannot determine from the tariff which telco will accept its access charge order or what the charges for the service will be. MCI further argues that this provision is anticompetitive in violation of Section 201(b) of the Act because it eliminates the possibility of true price competition between exchange telephone companies. SBS raises concerns for the proliferation of bills and orders that will result from this provision. The BOCs/CSO reply that the provisions are reasonable. They respond to MCI by stating that the tariff specifies that the exchange carriers will advise the IC which option will apply and that no carrier will set policy for another carrier's end office. In response to SBS, the BOCs/CSO state that because different tariffs may apply to different end offices each end office should receive an order. Further, the BOCs/CSO claim that these procedures match the current procedures in ENFIA tariffs.

DISCUSSION: This provision states that whenever more than one telco is involved in the provision of access service, the ordering, rating, and billing will be handled in one of two ways to be determined by the telco based on the interconnection arrangements between the two telephone companies. The first option available to the telephone companies generally allows the telco in whose territory the end user serving wire center is located to accept the order, determine the charges, arrange to provide the services and perform billing. The second option allows both telcos to accept the order, provide their portion of the service, and bill under their respective tariffs. A formula is provided to determine each telco's proportionate charges for the transport element.

We agree with MCI that this section raises significant questions of reasonableness and lawfulness under the Act. ICs will be unable to determine from the tariff which telco will accept its order or what charges might apply; the telephone companies' ability to make such arrangements by contract outside of the tariff raises questions of discrimination. We are particularly concerned about the first option (§ 2.4.8(A)), which would appear to establish billings for services in two exchange company territories under a single telcos tariff. We conclude that this option (§ 2.4.8(A)) must be deleted.

The second option (§ 2.4.8(B)), with two minor modifications, is a better approach. First, the formula for calculating the charge for each transport element must be simplified, using examples as necessary to illustrate its application. Second, the phrase "title page notwithstanding" appears to create an exception regarding mileage measurement for purposes of this section. The phrase must be explained. SBS has raised concerns generally for the proliferation of orders and bills, and we recognize that Section 2.4.8(B) will add to these numbers, however, we believe that the alternatives, such as that proposed in Section 2.4.8(A), are unreasonable. For these reasons, we direct that Section 2.4.8 be amended to establish a single provision for ordering, rating and billing when more than one telco is involved in providing access service. That provision should be Section 2.4.8(B) with the modifications indicated.

SUBJECT: General Regulations—Connections

ECA TARIFF REFERENCE: Section 2.5 (generally)

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

Section 2.5 covers over 40 tariff pages and details specific requirements for connection of customer equipment and systems (*i.e.* terminal equipment, multiline terminating systems and communications systems) with access services furnished by the telco. It establishes various provisions for: responsibilities of the IC, end user, and the telco; connections of equipment and systems subject to registration under Part 68 of our Rules, 47 C.F.R. Part 68; connections of

equipment and systems not subject to Part 68; procedures for control of signal power; minimum protection criteria for direct electrical connections; recording of two-way conversations; and provisions for connection to certain special access services.

ISSUES: Commenters raise several objections to various parts of this section. MCI raises several broad issues regarding Section 2.5. First, MCI contends that Section 2.5 improperly attempts to apply the regulations in Part 68 of the rules to carrier-to-carrier connections by restating or paraphrasing certain of those rules. Second, MCI argues that the telcos are unilaterally attempting to impose on OCCs interconnection requirements, many of which are unlawful because the telco has not demonstrated any potential for harm to its network that would necessitate such requirements. Finally, MCI alleges that this section resurrects the concepts of service Categories I, II and III, which the Commission has previously declined to add to Part 68, creating unnecessary confusion and complexity. The BOCs/CSO, in reply, state that these concerns are not valid, and that nothing in the section is intended to alter the Part 68 rules.

Other commenters raised concerns for certain vague and ambiguous provisions within Section 2.5. (AT&T, regarding the confusion surrounding the term "IC"; and ACS, regarding § 2.5.3(D)). RCA has argued that Section 2.5.4(E)(2)(e) is unnecessary and anticompetitive. The BOCs/CSO reply proposed to add at Section 2.5.12(F) and Section 2.5.14, respectively, interim programs for connection of channel service unit-like devices to HC1 and DDA1-4 facilities.

DISCUSSION: This section appears to propose interconnection provisions for all equipment and systems and for all telco customers. We have two chief concerns for this proposal. First, we are concerned about problems engendered by this section's duplication of certain of our Part 68 rules. This section paraphrases and restates significant provisions of Part 68 and makes them applicable to all customers. Thus, if these provisions were allowed to become effective, persons subject to Part 68 would have differently worded and potentially conflicting interconnection terms and conditions under both Part 68 and the tariff. We believe such a result would be unreasonable.

In a recent proposed rulemaking regarding the establishment of carrier-to-carrier interconnection under the access charge plan,* we proposed that each of the access tariffs merely contain an "appropriate reference to Part 68."** We agree with MCI that cross-referencing the proper Part 68 rules in the tariffs will avoid the confusion of two sets of interconnection provisions and the administrative problems involved in resolving contradictory wording.

Our second general concern regards the application of the Section 2.5 interconnection provisions to carriers and other customers not subject to Part 68. MCI has objected that, at least for OCCs, these technical connection provisions have traditionally been negotiated by the various carriers and included either in carrier initiated tariffs or in carrier agreements, such as the agreement contained in the OCC Facilities Tariffs developed as a result of CC Docket No. 20099, *Facilities for Use by Other Common Carriers*, 52 FCC 2d 727 (1975). MCI claims that the instant provisions have not been the subject of negotiation and, moreover, have not been justified by any demonstrated harm to the network.

Whether physical connection provisions should continue to be negotiated as they have in the past is an issue we are considering in our current Phase III rulemaking proceeding in CC Docket No. 78-72. We agree with MCI, however, that all tariff restrictions on interconnection must be supported by demonstrated harm to the network. We find in this instance that no such support has been shown.

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* MTS and WATS Market Structure, Phase III, Notice of Proposed Rulemaking, CC Docket No. 78-72, FCC 83-178, released May 31, 1983.

** *Id.*, at para. 39.

In light of our ongoing rulemaking in CC Docket No. 78-72, which includes a proposal to establish a joint planning body to develop industry-wide technical standards for interconnection, we believe that new interconnection standards and conditions in the access tariffs should await resolution of the important issues contained in that rulemaking. Moreover, since the manner of physical interconnection was essentially unaffected by the divestiture, we see no immediate need to change the existing interconnection terms and conditions which are contained in various tariffs.

Accordingly, because we have concluded that the provisions of Section 2.5 constitute unjustified restrictions on interconnection, that section should be deleted and replaced by references in the tariff to the existing interconnection requirements or new interconnection requirements as discussed below:

(1) Section 2.5 should reference provisions in AT&T Tariff F.C.C. Nos. 259, 260, 263, 267, 270 (and 273, if applicable) establishing both general and service - specific technical connection requirements for the individual services provided under each of those tariffs. (For example, for Terrestrial Digital Circuits (TDCs) the tariff would reference AT&T Tariff F.C.C. No. 270 Section 2.8, for general provisions, and Section 5.2, for service specific requirements.) Such provisions must be referenced only to the extent necessary to replace the corresponding provisions of the proposed Section 2.5. We would expect, however, that the referenced provisions would include those regulations which delineate the services covered by the particular tariff, delineate the application of Part 68, and provide for interim programs, such as those proposed in AT&T Tariff F.C.C. No. 270 for digital services and in many tariffs for test equipment;

(2) Section 2.5 should also provide that AT&T and any customers who were served under the nineteen BOC Facilities for OCC Tariffs and AT&T Tariff F.C.C. Nos. 266 and 268 developed as result of CC Docket 20099, will continue to use the connection provisions contained in those tariffs and any implemented provisions which resulted from CC Docket 20099 interconnection meetings. These connection provisions and any connection provisions contained in the BSOC Tariff Nos. 3, 4, 8, 9 and 11 should be referenced in the access tariffs to the extent necessary to replace the corresponding provisions of the proposed Section 2.5; and

(3) Specific connection provisions may be developed and included in Section 2.5 to cover offerings not presently delineated in any of designated material. Such provisions for digital facilities should address the Interim Program for connection of customer provided CSUs and CSU-like devices and other connection provisions within the general confines of Tariff 270, Sections 2.8 and 5.2.

The applicable referenced material from the tariffs noted above, and any other relevant documents developed as a result of CC Docket No. 20099 interconnection meetings, must be maintained by the exchange carriers in the posting locations required by Section 61.72 of our Rules, pending the establishment of permanent interconnection provisions.

The referenced material in paragraphs 1-3, above, should constitute all existing interconnection requirements. We conclude that, in conjunction with Part 68 of our rules, they should continue to govern interconnection by reference in the access tariffs until the significant questions of standard-setting and interconnection planning are resolved in our CC Docket 78-72, Phase III proceeding. Accordingly, we waive the requirements of Section 61.74 of our Rules which generally prohibit reference in a tariff to documents outside the tariff to the extent necessary to comply with the requirements we have set forth.

SUBJECT: General Regulations—Definitions—"Acceptance (Cooperative) Tests"

ECA TARIFF REFERENCE: Section 2.6

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"The term "Acceptance (Cooperative) Tests" denotes those nonchargeable tests which are performed by the Telephone Company in cooperation with the IC at the IC's request at the time service is installed."

DISCUSSION: This definition is unduly vague. It is unclear whether all IC test requests at the time of installation will qualify or only certain tests. Since provisions elsewhere in the tariff clearly state which tests are non-chargeable at the time of service installation, and since the provisions do not appear to use the term "Acceptance (Cooperative) Tests," we conclude that this definition is unnecessary and must be deleted.

SUBJECT: General Regulations—Definitions—"Access Code"

ECA TARIFF REFERENCE: Section 2.6

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"The term 'Access Code' denotes a uniform four or seven digit code assigned by the Telephone Company to an individual IC. The four digit code has the form 10XX, and the seven digit code has the form 950-10XX."

ISSUES: MCI contends that this definition unreasonably restricts the availability of an adequate number of access codes. The BOCs/CSO reply that MCI's objection is not well defined.

DISCUSSION: MCI argues that this definition limits an OCC to a single code and that such limitation will unreasonably constrict the OCCs' future growth. We are also concerned that sufficient access codes be available to all access service customers. We recognize, however, that the provision of multiple access codes per carrier might consume the limited number of codes available under the established scheme. This would require adding digits to the codes which could, in turn, require a basic restructuring of the exchange telephone system at great cost to the telephone companies and, ultimately, the ratepayers. Moreover, the language of this definition does not by its terms limit the number of access codes which may be provided a customer.

One of the primary purposes of this tariff is to provide for equal interconnection. MCI makes no claims that AT&T or any other carrier will be able to obtain a greater number of access codes than MCI. While we make no decision on the issue of multiple codes, we are not persuaded of the need to modify this definition at this point.

SUBJECT: General Regulations—Definitions—"Access Minutes"

ECA TARIFF REFERENCE: Section 2.6

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"The term 'Access Minutes' denotes that usage of exchange facilities in interstate or foreign service for the purpose of calculating chargeable usage. On the originating end of an interstate or foreign call, usage is measured from the time the originating End User's Call is delivered by the Telephone Company to and acknowledged as received by the IC's facilities connected with the originating exchange. On the terminating end of an interstate or foreign call, usage is measured from the time the call is received by the End User in the terminating

exchange. Timing of usage at both originating and terminating end[s] (sic) of an interstate or foreign call shall terminate when the calling or called party disconnects, whichever event is recognized first in the originating and terminating end exchanges, as applicable. Those two times are measured by the receipt of a signal known as answer/disconnect supervision."

ISSUES: MCI contends that this definition discriminates against OCCs with ENFIA A/ Feature Group A line-side connections. It further argues that the definition fails to define the increments in which the access minutes will be charged. The BOCs/CSO counter that MCI is seeking to reargue issues already decided by the Commission.

DISCUSSION: This provision reflects the change in computation of usage from conversation minutes to access minutes, as directed by our *First Reconsideration Order*, at para. 74. With this change, we also ordered an adjustment to the calculated usage to compensate OCCs for inferior access to the originating exchange network. We addressed MCI's discrimination argument in the *Second Reconsideration Order*, and, thus, shall not address this question here.

MCI also argues the need to identify increments in which access minutes will be charged. MCI argues that increments should be as small as feasible and any rounding should occur after all the increments have been added. MCI's points are well taken and we conclude that the definition of access minutes must be modified accordingly to specify the billing increments (such as 6 seconds, 5 seconds, etc.) and that they shall be totalled before any rounding occurs.

We have concerns for the final sentence in this definition which provides that access minutes are measured by receipt of answer/disconnect supervision signals. First, unlike the rest of the definition, the last sentence does not correspond with the existing definition of "access minutes" provided in Part 69 of our Rules, 47 C.F.R. § 69.2(gg). Second, the last sentence is also misleading because only Feature Group C currently has both answer and disconnect signal recognition capability. Other methods must be used for service provided under Feature Groups A and B. For the foregoing reasons, we conclude that the final sentence of the definition must be deleted and that specific provisions for the measurement of access minutes for each feature group must be included in rate provisions for the applicable rate elements elsewhere in the tariff.

SUBJECT: General Regulations—Definitions—"Average Business Day"

ECA TARIFF REFERENCE: Section 2.6

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"The term 'Average Business Day' denotes 8:00AM to 11:00PM, Monday through Friday, excluding national holidays."

ISSUES: MCI contends that this definition is unreasonable because it covers fifteen hours, which is far longer than the normal business day, even allowing for differences in domestic time zones. The BOCs/CSO respond that MCI's objection fails to state how ICs will be adversely affected.

DISCUSSION: We agree with MCI that this definition establishes an unreasonable time span which does not appear to correspond with normal business hours. The definition should be justified or it must be modified to correspond with normal business hours, *e.g.*, 8:00 a.m. Eastern Standard Time to 6:00 p.m. Pacific Standard Time.

SUBJECT: General Regulations—Definitions—"Busy Hour Minutes of Capacity"

ECA TARIFF REFERENCE: Section 2.6

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"The term 'Busy Hour Minutes of Capacity' denotes the average of the highest time consistent hour of usage during the highest twenty consecutive business day period during a calendar year."

DISCUSSION: This definition is unclear. It must be modified to clarify the meanings of "highest time consistent hour of usage" and "highest twenty consecutive business day period." If there is a standard engineering definition of such peak loading, it should be employed here.

SUBJECT: General Regulations—Definitions—"Carrier or Common Carrier"

ECA TARIFF REFERENCE: Section 2.6

OTHER TARIFF REFERENCE: Similar provisions in most other access tariffs, *cf.*, Southwestern Bell which should add a definition for "exchange" as discussed below).

TARIFF LANGAUGE:

"*Carrier or Common Carrier*The term 'Carrier or Common Carrier' denotes any individual partnership, associations (sic), joint-stock company, trust or corporation engaged for hire in interstate or foreign communications by wire or radio."

"*Common Carrier* See Carrier"

DISCUSSION: In reviewing the definitions for "Interstate Customer" (ICs) and "End Users" (*see*, those discussions, *infra)*, we determine that while the tariffs define IC to include apparently both carriers and end users they, in fact, employ the term in many instances throughout as a shorthand for Interexchange Carrier. (*See, e.g.*, §§ 2.3.10, 4.4 and 5.1.1). To eliminate this confusion we are directing changes in the relevant definitions. The definitions of Carrier and Common Carrier must be replaced by the following:

Interexchange Carrier (IC) or Interexchange Common Carrier The terms "Interexchange Carrier" (IC) or "Interexchange Common Carrier" denotes any individual, partnership, association, joint-stock company, trust, governmental entity or corporation engaged for hire in interstate or foreign communication by wire or radio, between two or more exchanges.

SUBJECT: General Regulations—Definitions—"Channel Service Unit Equivalent"

ECA TARIFF REFERENCE: Section 2.6

OTHER TARIFF REFERENCES: The BOCs/CSO reply proposed this addition to the ECA tariff.

TARIFF LANGUAGE:

"The Term 'Channel Service Unit Equivalent' denotes equipment which performs the functions of properly terminating a digital facility, regeneration (HC1) or amplification of signals (DDA1-4), recognition and correction of signal format errors (HC1) or signal shaping (DDA1-4), and remote loop-back."

DISCUSSION: The BOCs/CSO have proposed to add this definition to the ECA tariff to correspond with connection provisions it is proposing to add at Section 2.5.12(F) and Section 2.5.14, *supra*. (See discussion at §2.5.) This definition, however, does not comply with the

requirements imposed under CC Docket 81-216, * where we required that CSUs or CSU-like devices be unbundled from all digital circuits, services and facilities. This definition appears to limit CSUs to only two digital offerings rather than all digital offerings which would be required under CC Docket 81-216 and Part 68.2(f) of our Rules. Further, this definition would require that CSU equivalents include remote loop-back capability. In CC Docket 81-216 we did not find that CSUs must be able to perform remote loop-back functions. This definition must be revised to correspond with our decisions in CC Docket 81-216.

SUBJECT: General Regulations—Definitions—"Channelize"

ECA TARIFF REFERENCE: Section 2.6

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"The term 'Channelize' denotes the process of multiplexing-demultiplexing voice channels using analog or digital techniques."

DISCUSSION: This provision omits multiplexing of other non-voice channels without justification. We see no reason to differentiate or exclude any channels from the definition. The exclusion must be justified or the definitions must be modified to include all channels.

SUBJECT: General Regulations—Definitions—"Common Line"

ECA TARIFF REFERENCE: Section 2.6

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"The term 'Common Line' denotes a line, trunk, pay telephone line or other facility provided under the general and/or local exchange service tariffs of the Telephone Company, terminated on a central office switch and which may be used to make and receive exchange service calls, intrastate message service calls or interstate message calls no matter if the Customer causes the line, trunk or facility to be arranged to prohibit any type of calls to be made or received. A common line-residence is a line or trunk provided under the residence regulations of the general and/or local exchange service tariffs. A common line-business is a line provided under the business regulations of the general and/or local exchange service tariffs."

ISSUES: MCI contends that the definition of common line is erroneous and unlawful. The BOCs/CSO have replied that the definition is consistent with the Commission's use of the term.

DISCUSSION: In its comments on this definition MCI revisits several concerns regarding the basic framework of our Access Charge orders which it has raised previously. It argues generally that no part of the NTS costs of subscriber plant should be assigned to the interstate jurisdiction or, at the very least, all such costs so assigned should be recovered from AT&T, since among the ICs only AT&T was responsible for developing the separations

* Amendment of Part 68 of the Commission's Rules Concerning Connection of Telephone Equipment, System and Protective Apparatus to the Telephone Network, Third Notice of Proposed Rulemaking, CC Docket No. 81-216, FCC 83-268, released June 14, 1983, *stay denied*, Common Carrier Bureau Order, Mimeo No. 1503, released December 23, 1983.

process that resulted in this uneconomic cost assignment system. MCI contends that OCCs should pay ordinary business rates for their line-side connections to central offices. We see no need to reopen these basic issues which have been discussed and analyzed extensively as part of the access charge proceedings.

We are, however, concerned about this definition's apparent restrictions of use of the lines or facilities. Absent justification such restrictions cannot be allowed. Thus, the first sentence of this definition must be shortened to read: "The term 'Common Line' denotes a line, trunk, pay telephone line or other facility provided under the general and/or local exchange service tariffs of the Telephone Company, terminated on a central office switch."

SUBJECT: General Regulations—Definitions—"Effective 4-Wire"

ECA TARIFF REFERENCE: Section 2.6

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"The term 'Effective 4-Wire' denotes a condition which permits the simultaneous independent transmission of information in both directions over a channel. The method of implementing effective 4-wire transmission is at the discretion of the Telephone Company (physical, time domain, frequency-domain separation or echo cancellation techniques). Effective 4-wire channels may be terminated with a 2-wire interface at the End User premises or central office, but not at the IC point of interface. However, when terminated 2-wire, simultaneous independent transmission cannot be supported."

ISSUES: MCI contends that this definition would unreasonably prohibit 4-wire termination with a 2-wire interface at an IC's "point of interface."

DISCUSSION: This definition provides that the method of implementing effective 4-wire transmission is at the discretion of the telco. It allows effective 4-wire channels to be terminated with a 2-wire interface at end user premises or telco central offices, but not at an IC's point of termination. MCI complains that the restriction on the IC's point of termination is unreasonable because the exchange carriers have not demonstrated any potential harm to the network. We agree that such a restriction is not supported. The restriction against this type of termination at the IC's point of termination must be supported or deleted from this definition. Finally, the last sentence must be clarified. (*See also*, Section 2.1.5, *supra*, regarding modifications to the term "point of interface").

SUBJECT: General Regulations—Definitions—"End User"

ECA TARIFF REFERENCE: Section 2.6

OTHER TARIFF REFERENCE: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"The term 'End User' denotes any individual, partnership, association, corporation, governmental agency or any other entity which (A) obtains a common line or uses a pay telephone in the operating territory of the Telephone Company, or (B) subscribes to interstate service(s) provided by an IC or uses the services of the IC when the IC provides interstate service(s) for its own use."

DISCUSSION: The definition of end user and the delineation between this group and others, such as interexchange carriers (ICs), are critical to implementation of the Part 69 Access Charge rules, 47 C.F.R. Part 69. The access tariffs propose a definition of "end user" different

from that provided in Section 69.2(m) of our rules. We believe that the use of these two definitions could be misleading. Further, there is no reason to modify our Part 69 definition. Thus, the proposed definition of end user in the access tariffs must be replaced by the following Section 69.2(m) language as follows:

"End User" means any customer of an interstate or foreign telecommunications service that is not a carrier, except that a carrier shall be deemed to be an "end user" to the extent that such carrier uses a telecommunications service for administrative purposes, without making such service available to others, directly or indirectly.

SUBJECT: General Regulations—Definitions—"Facilities"

ECA TARIFF REFERENCE: Section 2.6

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"The term 'Facilities' denotes any cable, fiber optics, poles, conduit, microwave or carrier equipment, wire center distribution frames, central office switching equipment, computers (both hardware and software), business machines, etc., utilized to provide (1) the services offered under this tariff, or (2) the services provided by an IC for its own use or for an IC End User's use."

DISCUSSION: In conjunction with the clarification of definitions of IC, end user and customer in this section, the last clause of this definition must be modified to read "or (2) the services provided by a customer for its own use or for use by others." More fundamentally, it is unclear why the tariff requires a definition of the term "facilities," which has a generally accepted meaning, with the qualification "utilized to provide" service. This language is vague and conceivably could include trucks, office machines and other equipment that is incidentally used by telco personnel in the course of rendering service. The definition appears to serve no purpose in the tariff and could be a source of confusion. The need for the definition should be explained and justified.

SUBJECT: General Regulations—Definitions—"IC Terminal Location"

ECA TARIFF REFERENCE: Section 2.6

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"The term 'IC Terminal Location' denotes the point at which Access Service connects to the IC's interstate telecommunications service."

DISCUSSION: In accordance with the discussion in Section 2.1.5, *supra*, we are directing that this term be deleted as unnecessary. Any customer, whether IC or end user, may connect to access service at any authorized "premises," *see infra*, that definition, §2.6. We see no reason for a separate term for ICs.

SUBJECT: General Regulations—Definitions—"Interstate and Foreign Communications"

ECA TARIFF REFERENCE: Section 2.6

OTHER TARIFF REFERENCE: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"The term 'Interstate and Foreign Communications' denotes any communications subject to FCC oversight as provided under the Communications Act of 1934, as amended, and the F.C.C.'s Rules and Regulations."

ISSUES: MCI has objected generally that the use of the term "interstate communications" throughout the tariffs unreasonably excludes foreign communications.

DISCUSSION: In their reply comments, the BOCs/CSO have proposed to modify the above definition as follows:

"*Interstate Communications*

The term "Interstate Communications" denotes any communications, including foreign communications, subject to FCC oversight as provided under the Communications Act of 1934, as amended, and the FCC's Rules and Regulations."

While the proposed modification would sufficiently remedy the confusion which MCI points out regarding foreign communications, we are concerned about the rest of the definition. The Communications Act provides adequate definitions of both interstate communications and foreign communications. Additional definitions in the tariffs are unnecessary and can be misleading. The tariff definition must be modified to read:

"The term 'Interstate Communications' denotes both interstate and foreign communications."

SUBJECT: Application of Tariff and General Regulations—Definitions—"Interstate Customer"

ECA TARIFF REFERENCE: Section 1.1, Section 2.6

OTHER TARIFF REFERENCE: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"1.1 Application of Tariff

This tariff contains regulations, rates and charges applicable to the provision of Carrier Common Line, End User Access, Switched Access and Special Access Services, and other miscellaneous services, hereinafter referred to collectively as service(s), provided by the Issuing Carriers of this tariff, hereinafter referred to as the Telephone Company, to Interstate Customer(s), hereinafter referred to as IC(s)."

"2.6 Definitions

Interstate Customer(s)

The term 'Interstate Customer(s)' denotes any individual, partnership, association, corporation, or governmental agency or any other entity which subscribes to the services offered under this tariff to provide interstate telecommunications services for its own use or for the use of its customers (End Users)."

ISSUES: AT&T notes in its comments that the term "interstate customers" is broad enough to include "end users", yet the tariff appears to treat the two as separate classes of users of tariffed services. WU also contends that the definition is ambiguous regarding end users. MCI suggests that the definition of interstate customer violates Part 69 of our Rules (47 C.F.R. Part 69) because it refers solely to those providing interstate and not foreign communications.

DISCUSSION: As AT&T has pointed out, there are ambiguities both in the proposed definition of "interstate customers" and the use of that term throughout the tariff. The definition appears to include both carriers and end users who subscribe "for [their] own use."

In provisions throughout the tariff, however, the ECA refers to both "ICs" and end users as if they are distinct groups. (*See, e.g.*, §§2.1.1., 2.5.2, 7.1 and 9.2) These ambiguities are further compounded by the use of the shorthand "IC" (§1.1) for Interstate Customers, an acronym which has also been applied to interexchange carriers. Further, the tariff appears, in fact, to use the term IC in many instances throughout where it intends interexchange carrier and not Interstate Customer. (*See, e.g.* §§ 2.3.10, 4.4. and 5.1.1).

In addition to ambiguity problems, we are concerned about the use of the term "interstate" as applied to customers under this tariff. In the CC Docket No. 78-72 *First Reconsideration Order* at para. 90, the Commission used the term "customers" to refer to all those (whether carrier, reseller, enhanced service provider or end user, etc.) who subscribe to the services offered pursuant to the tariffs. As applied to carriers, use of the term "interstate" is unnecessary, because interstate service is the only service provided under the access tariffs. As applied to end users, the term "interstate" is misleading. All subscription to facilities available for interstate use is "interstate." Moreover, as MCI notes, the use of the word "interstate" appears to improperly exclude foreign communications service providers. For these reasons the term "Interstate Customer" must be stricken from Sections 1.1 and 2.6 and replaced by the following language:

1.1 This tariff contains regulations, rates and charges applicable to the provision of Carrier Common Line, End User Access, Switched Access and Special Access Services, and other miscellaneous services, hereinafter referred to collectively as service(s), provided by the Issuing Carriers of this tariff, hereinafter referred to as the Telephone Company, to Customer(s).

2.6 *Customer(s)* The term "Customer(s)" denotes any individual, partnership, association, joint-stock company, trust, corporation, or governmental entity or any other entity which subscribes to the services offered under this tariff, including both Interexchange Carriers (ICs) and End Users.

This revision eliminates the ambiguity and conforms to the general usage of the terms "IC" and "end user" in the tariffs. However, the propriety of using one term or the other in particular tariff sections must also be reviewed and in many cases revised to carry out the Access Charge plan. In general, we seek to eliminate so far as possible differences in services and rates based on whether the customer is a carrier or end user, *First Reconsideration Order*, para. 90. For example, end users should be able to obtain access services offered to ICs if they wish, in addition to services expressly reserved for end users. We have corrected some instances where usage of these terms in the tariff is improperly restrictive, but other instances undoubtedly exist. Carriers should review their tariffs to assure that usage of these terms does not in any case imply an unjustified restriction on customer choice.

SUBJECT: General Regulations—Definitions—"Access Code"

ECA TARIFF REFERENCE: Section 2.6

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"The term "Access Code" denotes a uniform four or seven digit code assigned by the Telephone Company to an individual IC. The four digit code has the form 10XX, and the seven digit code has the form 950-10XX."

ISSUES: MCI contends that this definition unreasonably restricts the availability of an adequate number of access codes. The BOCs/CSO reply that MCI's objection is not well defined.

DISCUSSION: MCI argues that this definition limits an OCC to a single code and that such limitation will unreasonably constrict the OCCs' future growth. We are also concerned that sufficient access codes be available to all access service customers. We recognize, however, that the provision of multiple access codes per carrier might consume the limited number of codes available under the established scheme. This would require adding digits to the codes which could, in turn, require a basic restructuring of the exchange telephone system at great cost to the telephone companies and, ultimately, the ratepayers. Moreover, the language of this definition does not by its terms limit the number of access codes which may be provided a customer.

One of the primary purposes of this tariff is to provide for equal interconnection. MCI makes no claims that AT&T or any other carrier will be able to obtain a greater number of access codes than MCI. While we make no decision on the issue of multiple codes, we are not persuaded of the need to modify this definition at this point.

SUBJECT: General Regulations—Definitions—"Access Minutes"

ECA TARIFF REFERENCE: Section 2.6

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"The term "Access Minutes" denotes that usage of exchange facilities in interstate or foreign service for the purpose of calculating chargeable usage. On the originating end of an interstate or foreign call, usage is measured from the time the originating End User's Call is delivered by the Telephone Company to and acknowledged as received by the IC's facilities connected with the originating exchange. On the terminating end of an interstate or foreign call, usage is measured from the time the call is received by the End User in the terminating exchange. Timing of usage at both originating and terminating end[s](sic) of an interstate or foreign call shall terminate when the calling or called party disconnects, whichever event is recognized first in the originating and terminating end exchanges, as applicable. Those two times are measured by the receipt of a signal known as answer/disconnect supervision."

ISSUES: MCI contends that this definition discriminates against OCCs with ENFIA A/ Feature Group A line-side connections. It further argues that the definition fails to define the increments in which the access minutes will be charged. The BOCs/CSO counter that MCI is seeking to reargue issues already decided by the Commission.

DISCUSSION: This provision reflects the change in computation of usage charges from conversation minutes to access minutes, as directed by our *First Reconsideration Order*, at para. 74. With this change, we also ordered an adjustment to the calculated usage to compensate OCCs for inferior access to the originating exchange network. We addressed MCI's discrimination argument in the *Second Reconsideration Order*, and, thus, shall not address this question here.

MCI also argues the need to identify increments in which access minutes will be charged. MCI argues that increments should be as small as feasible and any rounding should occur after all the increments have been added. MCI's points are well taken and we conclude that the definition of access minutes must be modified accordingly to specify the billing increments (such as 6 seconds, 5 seconds, etc.) and that they shall be totalled before any rounding occurs.

We have concerns for the final sentence in this definition which provides that access minutes are measured by receipt of answer/disconnect supervision signals. First, unlike the rest of the definition, the last sentence does not correspond with the existing definition of "access minutes" provided in Part 69 of our Rules, 47 C.F.R. § 69.2(gg). Second, the last

sentence is also misleading because only Feature Group C currently has both answer and disconnect signal recognition capability. Other methods must be used for service provided under Feature Groups A and B. For the foregoing reasons, we conclude that the final sentence of the definition must be deleted and that specific provisions for the measurement of access minutes for each feature group must be included in rate provisions for the applicable rate elements elsewhere in the tariff.

SUBJECT: General Regulations—Definitions—"Average Business Day"

ECA TARIFF REFERENCE: Section 2.6

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"The term "Average Business Day" denotes 8:00AM to 11:00PM, Monday through Friday, excluding national holidays."

ISSUES: MCI contends that this definition is unreasonable because it covers fifteen hours, which is far longer than the normal business day, even allowing for differences in domestic time zones. The BOCs/CSO respond that MCI's objection fails to state how ICs will be adversely affected.

DISCUSSION: We agree with MCI that this definition establishes an unreasonable time span which does not appear to correspond with normal business hours. The definition should be justified or it must be modified to correspond with normal business hours, *e.g.*, 8:00 a.m. Eastern Standard Time to 6:00 p.m. Pacific Standard Time.

SUBJECT: General Regulations—Definitions—"Busy Hour Minutes of Capacity"

ECA TARIFF REFERENCE: Section 2.6

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"The term "Busy Hour Minutes of Capacity" denotes the average of the highest time consistent hour of usage during the highest twenty consecutive business day period during a calendar year."

DISCUSSION: This definition is unclear. It must be modified to clarify the meanings of "highest time consistent hour of usage" and "highest twenty consecutive business day period." If there is a standard engineering definition of such peak loading, it should be employed here.

SUBJECT: General Regulations—Definitions—"Carrier or Common Carrier"

ECA TARIFF REFERENCE: Section 2.6

OTHER TARIFF REFERENCE: Similar provisions in most other access tariffs, *cf.*, Southwestern Bell which should add a definition for "exchange" as discussed below).

TARIFF LANGAUGE:

"*Carrier or Common Carrier*The term "Carrier or Common Carrier" denotes any individual partnership, associations (sic), joint-stock company, trust or corporation engaged for hire in interstate or foreign communications by wire or radio."

"*Common Carrier* See Carrier"

DISCUSSION: In reviewing the definitions for "Interstate Customer" (ICs) and "End Users" (*see*, those discussions, *infra)*, we determine that while the tariffs define IC to include apparently both carriers and end users they, in fact, employ the term in many instances throughout as a shorthand for Interexchange Carrier. (*See, e.g.*, §§ 2.3.10, 4.4 and 5.1.1). To eliminate this confusion we are directing changes in the relevant definitions. The definitions of Carrier and Common Carrier must be replaced by the following:

Interexchange Carrier (IC) or Interexchange Common Carrier The terms "Interexchange Carrier" (IC) or "Interexchange Common Carrier" denotes any individual, partnership, association, joint-stock company, trust, governmental entity or corporation engaged for hire in interstate or foreign communication by wire or radio, between two or more exchanges.

SUBJECT: General Regulations—Definitions—"Channel Service Unit Equivalent"

ECA TARIFF REFERENCE: Section 2.6

OTHER TARIFF REFERENCES: The BOCs/CSO reply proposed this addition to the ECA tariff.

TARIFF LANGUAGE:

"The Term "Channel Service Unit Equivalent" denotes equipment which performs the functions of properly terminating a digital facility, regeneration (HC1) or amplification of signals (DDA1-4), recognition and correction of signal format errors (HC1) or signal shaping (DDA1-4), and remote loop-back."

DISCUSSION: The BOCs/CSO have proposed to add this definition to the ECA tariff to correspond with connection provisions it is proposing to add at Section 2.5.12(F) and Section 2.5.14, *supra.* (See discussion at § 2.5.) This definition, however, does not comply with the requirements imposed under CC Docket 81-216, * where we required that CSUs or CSU-like devices be unbundled from all digital circuits, services and facilities. This definition appears to limit CSUs to only two digital offerings rather than all digital offerings which would be required under CC Docket 81-216 and Part 68.2(f) of our Rules. Further, this definition would require that CSU equivalents include remote loop-back capability. In CC Docket 81-216 we did not find that CSUs must be able to perform remote loop-back functions. This definition must be revised to correspond with our decisions in CC Docket 81-216.

SUBJECT: General Regulations—Definitions—"Channelize"

ECA TARIFF REFERENCE: Section 2.6

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

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* Amendment of Part 68 of the Commission's Rules Concerning Connection of Telephone Equipment, Systems and Protective Apparatus to the Telephone Network, Third Notice of Proposed Rulemaking, CC Docket No. 81-216, FCC 83-268, released June 14, 1983, *stay denied*, Common Carrier Bureau Order, Mimeo No. 1503, released December 23, 1983.

"The term "Channelize" denotes the process of multiplexing-demultiplexing voice channels using analog or digital techniques."

DISCUSSION: This provision omits multiplexing of other non-voice channels without justification. We see no reason to differentiate or exclude any channels from the definition. The exclusion must be justified or the definitions must be modified to include all channels.

SUBJECT: General Regulations—Definitions—"Common Line"

ECA TARIFF REFERENCE: Section 2.6

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"The term "Common Line" denotes a line, trunk, pay telephone line or other facility provided under the general and/or local exchange service tariffs of the Telephone Company, terminated on a central office switch and which may be used to make and receive exchange service calls, intrastate message service calls or interstate message calls no matter if the Customer causes the line, trunk or facility to be arranged to prohibit any type of calls to be made or received. A common line-residence is a line or trunk provided under the residence regulations of the general and/or local exchange service tariffs. A common line-business is a line provided under the business regulations of the general and/or local exchange service tariffs."

ISSUES: MCI contends that the definition of common line is erroneous and unlawful. The BOCs/CSO have replied that the definition is consistent with the Commission's use of the term.

DISCUSSION: In its comments on this definition MCI revisits several concerns regarding the basic framework of our Access Charge orders which it has raised previously. It argues generally that no part of the NTS costs of subscriber plant should be assigned to the interstate jurisdiction or, at the very least, all such costs so assigned should be recovered from AT&T, since among the ICs only AT&T was responsible for developing the separations process that resulted in this uneconomic cost assignment system. MCI concludes that OCCs should pay ordinary business rates for their line-side connections to central offices. We see no need to reopen these basic issues which have been discussed and analyzed extensively as part of the access charge proceedings.

We are, however, concerned about this definition's apparent restrictions of use of the lines or facilities. Absent justification such restrictions cannot be allowed. Thus, the first sentence of this definition must be shortened to read: "The term "Common Line" denotes a line, trunk, pay telephone line or other facility provided under the general and/or local exchange service tariffs of the Telephone Company, terminated on a central office switch."

SUBJECT: General Regulations—Definitions—"Effective 4-Wire"

ECA TARIFF REFERENCE: Section 2.6

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"The term "Effective 4-Wire" denotes a condition which permits the simultaneous independent transmission of information in both directions over a channel. The method of implementing effective 4-wire transmission is at the discretion of the Telephone Company (physical, time domain, frequency-domain separation or echo cancellation techniques).

Effective 4-wire channels may be terminated with a 2-wire interface at the End User premises or central office, but not at the IC point of interface. However, when terminated 2-wire, simultaneous independent transmission cannot be supported."

ISSUES: MCI contends that this definition would unreasonably prohibit 4-wire termination with a 2-wire interface at an IC's "point of interface."

DISCUSSION: This definition provides that the method of implementing effective 4-wire transmission is at the discretion of the telco. It allows effective 4-wire channels to be terminated with a 2-wire interface at end user premises or telco central offices, but not at an IC's point of termination. MCI complains that the restriction on the IC's point of termination is unreasonable because the exchange carriers have not demonstrated any potential harm to the network. We agree that such a restriction is not supported. The restriction against this type of termination at the IC's point of termination must be supported or deleted from this definition. Finally, the last sentence must be clarified. (*See also*, Section 2.1.5, *supra*, regarding modifications to the term "point of interface").

SUBJECT: General Regulations—Definitions—"End User"

ECA TARIFF REFERENCE: Section 2.6

OTHER TARIFF REFERENCE: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"The term "End User" denotes any individual, partnership, association, corporation, governmental agency or any other entity which (A) obtains a common line or uses a pay telephone in the operating territory of the Telephone Company, or (B) subscribes to interstate service(s) provided by an IC or uses the services of the IC when the IC provides interstate service(s) for its own use."

DISCUSSION: The definition of end user and the delineation between this group and others, such as interexchange carriers (ICs), are critical to implementation of the Part 69 Access Charge rules, 47 C.F.R. Part 69. The access tariffs propose a definition of "end user" different from that provided in Section 69.2(m) of our rules. We believe that the use of these two definitions could be misleading. Further, there is no reason to modify our Part 69 definition. Thus, the proposed definition of end user in the access tariffs must be replaced by the following Section 69.2(m) language as follows:

"End User" means any customer of an interstate or foreign telecommunications service that is not a carrier, except that a carrier shall be deemed to be an "end user" to the extent that such carrier uses a telecommunications service for administrative purposes, without making such service available to others, directly or indirectly.

SUBJECT: General Regulations—Definitions—"Facilities"

ECA TARIFF REFERENCE: Section 2.6

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"The term "Facilities" denotes any cable, fiber optics, poles, conduit, microwave or carrier equipment, wire center distribution frames, central office switching equipment, computers (both hardware and software), business machines, etc., utilized to provide (1) the services

offered under this tariff, or (2) the services provided by an IC for its own use or for an IC End User's use."

DISCUSSION: In conjunction with the clarification of definitions of IC, end user and customer in this section, the last clause of this definition must be modified to read "or (2) the services provided by a customer for its own use or for use by others." More fundamentally, it is unclear why the tariff requires a definition of the term "facilities," which has a generally accepted meaning, with the qualification "utilized to provide" service. This language is vague and conceivably could include trucks, office machines and other equipment that is incidentally used by telco personnel in the course of rendering service. The definition appears to serve no purpose in the tariff and could be a source of confusion. The need for the definition should be explained and justified.

SUBJECT: General Regulations—Definitions—"IC Terminal Location"

ECA TARIFF REFERENCE: Section 2.6

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"The term "IC Terminal Location" denotes the point at which Access Service connects to the IC's interstate telecommunications service."

DISCUSSION: In accordance with the discussion in Section 2.1.5, *supra*, we are directing that this term be deleted as unnecessary. Any customer, whether IC or end user, may connect to access service at any authorized "premises," *see infra*, that definition, § 2.6. We see no reason for a separate term for ICs.

SUBJECT: General Regulations—Definitions—"Interstate and Foreign Communications"

ECA TARIFF REFERENCE: Section 2.6

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"The term "Interstate and Foreign Communications" denotes any communications subject to FCC oversight as provided under the Communications Act of 1934, as amended, and the F.C.C.'s Rules and Regulations."

ISSUES: MCI has objected generally that the use of the term "interstate communications" throughout the tariffs unreasonably excludes foreign communications.

DISCUSSION: In their reply comments, the BOCs/CSO have proposed to modify the above definition as follows:

"*Interstate Communications*

The term "Interstate Communications" denotes any communications, including foreign communications, subject to FCC oversight as provided under the Communications Act of 1934, as amended, and the FCC's Rules and Regulations."

While the proposed modification would sufficiently remedy the confusion which MCI points out regarding foreign communications, we are concerned about the rest of the definition. The Communications Act provides adequate definitions of both interstate communications and foreign communications. Additional definitions in the tariffs are unnecessary and can be misleading. The tariff definition must be modified to read:

"The term "Interstate Communications" denotes both interstate and foreign communications."

SUBJECT: Application of Tariff and General Regulations—Definitions—"Interstate Customer"

ECA TARIFF REFERENCE: Section 1.1, Section 2.6

OTHER TARIFF REFERENCE: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"1.1 Application of Tariff

This tariff contains regulations, rates and charges applicable to the provision of Carrier Common Line, End User Access, Switched Access and Special Access Services, and other miscellaneous services, hereinafter referred to collectively as service(s), provided by the Issuing Carriers of this tariff, hereinafter referred to as the Telephone Company, to Interstate Customer(s), hereinafter referred to as IC(s)."

"2.6 Definitions

Interstate Customer(s)

The term "Interstate Customer(s)" denotes any individual, partnership, association, corporation, or governmental agency or any other entity which subscribes to the services offered under this tariff to provide interstate telecommunications services for its own use or for the use of its customers (End Users)."

ISSUES: AT&T notes in its comments that the term "interstate customers" is broad enough to include "end users", yet the tariff appears to treat the two as separate classes of users of tariffed services. WU also contends that the definition is ambiguous regarding end users. MCI suggests that the definition of interstate customer violates Part 69 of our Rules (47 C.F.R. Part 69) because it refers solely to those providing interstate and not foreign communications.

DISCUSSION: As AT&T has pointed out, there are ambiguities both in the proposed definition of "interstate customers" and the use of that term throughout the tariff. The definition appears to include both carriers and end users who subscribe "for [their] own use." In provisions throughout the tariff, however, the ECA refers to both "ICs" and end users as if they are distinct groups. (*See, e.g.*, §§ 2.1.1, 2.5.2, 7.1 and 9.2) These ambiguities are further compounded by the use of the shorthand "IC" (§ 1.1) for Interstate Customers, an acronym which has also been applied to interexchange carriers. Further, the tariff appears, in fact, to use the term IC in many instances throughout where it intends interexchange carrier and not Interstate Customer. (*See, e.g.* §§ 2.3.10, 4.4. and 5.1.1).

In addition to ambiguity problems, we are concerned about the use of the term "interstate" as applied to customers under this tariff. In the CC Docket No. 78-72 *First Reconsideration Order* at para. 90, the Commission used the term "customers" to refer to all those (whether carrier, reseller, enhanced service provider or end user, etc.) who subscribe to the services offered pursuant to the tariffs. As applied to carriers, use of the term "interstate" is unnecessary, because interstate service is the only service provided under the access tariffs. As applied to end users, the term "interstate" is misleading. All subscription to facilities available for interstate use is "interstate." Moreover, as MCI notes, the use of the word "interstate" appears to improperly exclude foreign communications service providers. For these reasons the term "Interstate Customer" must be stricken from Sections 1.1 and 2.6 and replaced by the following language:

1.1 This tariff contains regulations, rates and charges applicable to the provision of Carrier Common Line, End User Access, Switched Access and Special Access Services, and other miscellaneous services, hereinafter referred to collectively as service(s), provided by the Issuing Carriers of this tariff, hereinafter referred to as the Telephone Company, to Customer(s).

2.6 *Customer(s)* The term "Customer(s)" denotes any individual, partnership, association, joint-stock company, trust, corporation, or governmental entity or any other entity which subscribes to the services offered under this tariff, including both Interexchange Carriers (ICs) and End Users.

This revision eliminates the ambiguity and conforms to the general usage of the terms "IC" and "end user" in the tariffs. However, the propriety of using one term or the other in particular tariff sections must also be reviewed and in many cases revised to carry out the Access Charge plan. In general, we seek to eliminate so far as possible differences in services and rates based on whether the customer is a carrier or end user, *First Reconsideration Order*, para. 90. For example, end users should be able to obtain access services offered to ICs if they wish, in addition to services expressly reserved for end users. We have corrected some instances where usage of these terms in the tariff is improperly restrictive, but other instances undoubtedly exist. Carriers should review their tariffs to assure that usage of these terms does not in any case imply an unjustified restriction on customer choice.

SUBJECT: General Regulations — Definitions — "Jointly Used Subscriber Plant"

ECA TARIFF REFERENCE: Section 2.6

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"The term "Jointly Used Subscriber Plant" denotes the local non-traffic sensitive Telephone Exchange Service facilities furnished in connection with Switched Exchange Access provided to an IC to complete an interstate call via an IC's intercity network to or from Telephone Exchange Service locations."

ISSUES: MCI contends that this definition is ambiguous and unlawful. The BOCs/CSO respond that it is consistent with the Commission's use of the term.

DISCUSSION: MCI contends that this definition undertakes to define the same facilities as the "Common Line" definition, *supra*, but is limited to IC subscriber lines and implies that it includes the costs of *all* local NTS exchange facilities over which interexchange calls can be originated or terminated. MCI argues that if such is the intent, this definition is improper for the same reason that MCI raised regarding the "common line" definition (*see supra*, that discussion, Section 2.6). We shall not revisit these complaints which we have already addressed as part of the access charge proceedings. We do conclude, however, that the relationship between a "common line" and "jointly used subscriber plant" must be clarified in these definitions so as to clearly disclose the differences, if any.

SUBJECT: General Regulations — Definitions — "Local Access and Transport Area"

ECA TARIFF REFERENCE: Section 2.6

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs, *but cf.*, Southwestern Bell (which has no definition of "Exchange").

TARIFF LANGUAGE:

"The term "Local Access and Transport Area" denotes a geographic area established by the Telephone Company for the provision and administration of communications service. It encompasses designated exchanges, which are grouped to serve common social, economic and other purposes."

ISSUES: MCI argues that this definition is confusingly similar to the tariff's definition of "Exchange".

DISCUSSION: We have two concerns for this definition. First, we agree with MCI that it appears little different from the definition of an "exchange." The distinctions between these two concepts must be clarified. Second, the tariff incorrectly states that local access and transport areas are established by the telephone company. These areas were established pursuant to the MFJ. This definition should be corrected according to the foregoing discussion.

SUBJECT: General Regulations — Definitions — "Loop Around Test Line"

ECA TARIFF REFERENCE: Section 2.6

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"The term "Loop Around Test Line" denotes an arrangement in an end office which provides a means for making two-way transmission tests on a manual basis. This arrangement has two terminations, each reached by means of a separate seven-digit number."

DISCUSSION: This definition is unclear; for example, it cannot be determined whether network channel terminating equipment is included in the testing arrangement. This provision must be clarified to show what equipment is subject to the test arrangement.

SUBJECT: General Regulations — Definitions — "Network Interface"; "Point of Interface"

ECA TARIFF REFERENCE: Section 2.6

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs, *but cf.* Southwestern Bell which consolidates the terms in its definition of "facility interface."

TARIFF LANGUAGE:

"*Network Interface*

The term "Network Interface" denotes the point of demarcation, on the End User's premises at which the Telephone Company's responsibility for the provision of Access Service end (sic)."

"*Point of Interface*

The term "Point of Interface" denotes the point of demarcation, at the IC's terminal location, between the Telephone Company provided and the IC procided services."

DISCUSSION: In accordance with the discussion in Section 2.3.3, *supra*, these two terms appear to provide differing treatment for IC's and end users without justification. We see no need for two separate and confusing terms. Thus, we are directing that these two terms be replaced by a single term — "Point of Termination" — which should be defined in Section 2.6 as follows: "The point of demarcation within a customer-designated premises at which the

Telephone Company's responsibility for the provision of Access Service ends." References within the tariffs to "Point of Interface" and "Network Interface" should be changed to correspond with the new terminology.

SUBJECT: General Regulations — Definitions — "Premises"

ECA TARIFF REFERENCE: Section 2.6

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs, *cf.*, Southwestern Bell.

TARIFF LANGUAGE:

"The term "Premises" denotes a building or portion(s) of a building occupied by a single IC or End User either as place of business or residence. Adjacent buildings and the buildings on the same continuous property occupied by the IC or End User, not separated by a public thoroughfare, are also considered the IC or End User's premises."

DISCUSSION: "Premises" is a commonly used term which has historically been used to identify "a building or buildings on continuous property (except railroad right-of-way, etc.) not separated by a public highway." (*See, e.g.*, AT&T Tariff F.C.C. No. 260, at page 27). The new definition proposed here would unreasonably restrict a premises to a building occupied by a single IC or end user who uses it as place of business or residence. No support has been provided for such restrictions. This definition must be replaced by the traditional language provided in this discussion, above.

SUBJECT: General Regulations — Definitions — "Service Terminating Arrangement"

ECA TARIFF REFERENCE: Section 2.6

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"The term "Service Terminating Arrangement" denotes equipment furnished by the Telephone Company which is utilized for the termination of Telephone Company provided Access Service. Such "Service Terminating Arrangement" provides a clearly delineated interface which facilitates the design, isolation, and testing of the access Service where the service is connected with IC or End User provided communications systems."

DISCUSSION: This definition must be clarified to specify what equipment is encompassed by the arrangement and whether it includes channel service unit, channel service unit-like devices, and/or network channel terminating equipment in light of our decision in CC Docket No. 81-216. *See also,* discussion of Section 3.3.4, *infra.*

SUBJECT: General Regulations — Definitions — "Transmission Performance"

ECA TARIFF REFERENCE: Section 2.6

OTHER TARIFF REFERENCES: Similar provisions in most other access tariffs.

TARIFF LANGUAGE:

"The term "Transmission Performance" denotes the immediate action limits beyond which the Telephone Company will accept an IC's trouble report and take corrective action."

DISCUSSION: This definition unduly vague and ambiguous. It provides no guidance regarding what constitutes "Transmission Performance." If this section is designed to state certain telco responsibilities, it must be clarified to identify these responsibilities and should be included in the portion of the tariff which establishes the telco's responsibilities.

Section 3. Carrier Common Line Access Service

Under the Commission's access charge rules, common line charges are assessed in order to recover the separated interstate costs associated with individual subscriber lines, pay telephone equipment, and customer premises equipment not yet removed from the rate base.[1] Essentially, these costs are "pooled" (averaged) on a nationwide basis, and are then assigned to both interstate carriers (ICs) and end users, with the amount to be recovered from each group varying over the course of a transition period. At first, a relatively small percentage of these costs will be assigned to end users, and will be collected in the form of a flat monthly charge. *See infra* discussion of § 4. The balance of these costs will be recovered from ICs through assessment of carrier common line access charges.

Originally, it was envisioned that all ICs would pay a share of common line costs on a usage basis (i.e. a charge expressed in cents per minute of use). As the relative burden of common line costs shifts to end users, the per minute charge to carriers would be expected to decrease until, at the end of the transition period, only the costs of the pay telephone element and the Universal Service Fund would be recovered under the carrier common line element. Moreover, under the Commission's *First Reconsideration Order,* we expected that the charge for ICs receiving non-premium access would be discounted by 35% percent in order to compensate for the difference in access quality received by these carriers. During the transition, the discount level would also decrease, in order to reflect the greater availability of equal access arrangements.

The Access Charge plan required the ECA to calculate the premium and non-premium carrier common line charge, and also directed the ECA to collect these charges from ICs for distribution to exchange carriers. All exchange carriers wishing to participate in the distribution of carrier common line charge revenue were required to concur in the ECA tariff with respect to these charges.

The ECA has attempted to implement these rules within Section 3 of its tariff. As filed, the tariff imposes a premium charge of $.0461 per minute. At the discount level of 35%, the non premium charge would be $.03 per minute. In a number of respects, however, the manner in which common line costs will be recovered has been altered by the Commission's *Second Reconsideration.* Most significantly, the amount of common line

[1] In addition, costs attributable to the Universal Service Fund will be recovered through the common line access charge in future years.

costs assigned to ICs will be increased because the imposition of flat charges on residential and single line business subscribers has been delayed pending further study. Therefore, the costs that would have been recovered through these end user charges will continue to be assigned to the carrier common line element. This, in turn, may warrant an increase in the level of the carrier common line rate element. In addition, the per minute rate structure for carriers receiving non-premium access has been changed to a flat monthly rate per line, and the level of non-premium discount has been increased. Therefore, many of the rates and charges assessed on a usage sensitive basis will have to be modified as they apply to IC access charges.

We have determined that a number of specific provisions in this section of the tariff are not in accordance with the Commission's access charge rules. In particular, we are concerned with the treatment of resellers of MTS, WATS and the MTS/WATS-type services. Carrier Common Line charges apply to all ICs who provide MTS, WATS and MTS/WATS-type services in the first instance. Therefore, additional application of Carrier Common Line charges to resellers of these services presents a possibility of double recovery. *See infra* discussion of §§ 3.3, 3.7. Other troublesome provisions within Section 3 of the ECA tariff involve reporting requirements, *see infra* § 3.4; auditing and verification rights, *see id.;* payment provisions, *see infra* § 3.5; recourse adjustments for IC coin revenue, *see infra* § 3.6(C); and assumed average access minutes, *see infra* § 3.7(C).

SUBJECT: Carrier Common Line Access Service — Undertaking of the Telephone Company where the IC is solely reselling MTS/WATS or MTS-type services.

ECA TARIFF REFERENCE: Section 3.3(B). *See also* § 6.8.4.

OTHER TARIFF REFERENCES: Provision cross-referenced by all access tariffs.

TARIFF LANGUAGE:

"(B) Where the IC is solely reselling MTS/WATS or MTS-type services, the Telephone Company, when the IC orders line side switched access, will not provide Switched Access Service under this tariff but will provide switched access such as local business exchange service for such resale under the Telephone Company general and/or local exchange service tariffs for the locations involved. Carrier Common Line Access charge will not apply for such access."

ISSUES: This provision is ambiguous with respect to the switched access service to be received by ICs engaged in resale of MTS/WATS and MTS-type services. In addition, ALTEL suggests that the tariff should offer resellers of WATS the option of obtaining Dedicated Transport facilities at Dedicated transport rates plus the Special Access Charge.

DISCUSSION: This provision states that, where the IC is solely reselling MTS/WATS or MTS-like services,* the IC will not receive Switched Access Service under the telco's access service tariff, but will instead receive switched access "such as" local business exchange service for such resale. This reference is ambiguous; the Commission's rules require that resellers of these services must be permitted to obtain access service at generally applicable local business exchange service rates. The tariff should therefore specify that, in these cases, switched access service will be provided at the generally applicable local business exchange rates.**

In addition, the word "solely" should be removed to conform with the requirements of the *First Reconsideration Order.* The application of local business exchange rates does not depend on whether the reseller engages in other activities. Any provision in other parts of the tariff that is inconsistent with this view should be removed.

We are in agreement with ALTEL's suggestion that trunk side access be made available to resellers. The availability of higher quality access should not be limited to carriers who own their own facilities. On the other hand, resellers should not be required to pay the double contribution that would result if they were to pay both the WATS rate and the Carrier Common Line charge for trunk side access. Therefore, contrary to ALTEL's suggestion, a charge based on the Dedicated Transport element would not be correct. Instead, the rate for this service must include all Switched Access rate elements except Carrier Common Line charges.

SUBJECT: Application of Carrier Common Line Charges to Resellers of OCC WATS-Type Services

ECA TARIFF REFERENCE: Section 3.3(C)

OTHER TARIFF REFERENCES: Provision cross-referenced by all access tariffs

TARIFF LANGUAGE:

"(C) Where the IC is (1) reselling Private Line service of another IC to provide MTS/WATS-type service or reselling WATS-type services of an IC and (2) the Telephone Company provides a Special Access Service, other than Dedicated Access Line Service, for the resold service terminated at the IC terminal location, the Telephone Company will, when the IC offering the resale service orders any switched access, provide Special Access Service as set forth in 7.4.2(B) following and Switched Access Service as set forth in 6. following. Carrier Common Line Access rates and charges as set forth in 3.8 following apply in accordance with the regulations as set forth in 3.7(G) following."

ISSUES: Several commenters contend that the application of Carrier Common Line Charges to resellers of OCC WATS-type services is unlawful (ACS, ECSA, GTES, LC, MCI, SBS, TSC/SI, TNI, USTEL, WU)

DISCUSSION: Section 69.5 of the Commission's Access Charge Rules specifies that carrier's carrier charges, including carrier common line charges, shall be assessed on all IC's using Telco facilities for the provision of interstate or foreign telecommunications services, "except that carrier common line [and other traffic sensitive elements] . . . shall not be assessed upon an interexchange carrier to the extent that it resells services for which these charges have already been assessed (e.g., MTS, WATS *and the MTS/WATS-type services of other common carriers*) . . . ." 47 C.F.R. § 69.5 (emphasis added).

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* The provision should also include WATS-type services. *See infra,* discussion of § 3.3(C).

** The term "local business exchange rate" is discussed below in connection with § 6.8.4.

The inclusion of WATS-type service resale in Section 3.3(C) would have the effect of applying carrier's carrier charges to these services, and thus appears to be in direct conflict with Section 69.5 of the Commission's Rules. Accordingly, Section 3.3 of the tariff must be modified so as to exempt resale of OCC WATS-type services from carrier common line charges, at least to the extent that the resold service has already been assessed such charges.

The Reply comments from several exchange carriers (BOCs/CSO) quote excerpts from our *First Reconsideration Order* that allegedly mandate application of carrier's carrier charges to OCC-WATS resale. Careful reading of those excerpts indicates that we referred only to the application of carrier's carrier charges to the original providers of WATS-type service, or resellers of private lines used to form MTS/WTS equivalents. *See, e.g., First Reconsideration Order* at paras. 83, 85 n.63. In these cases, carrier's carrier charges would remain unassessed if not applied to the reseller. This situation is entirely different from resale of WATS-type services, where the OCC providing the underlying service for resale has already paid carrier's carrier charges for access.

With the deletion of WATS-type services from this provision, it appears that the remainder of the provision would be unnecessary. Therefore, unless there are other reasons for retaining Section 3.3(C), the provision should be deleted.

SUBJECT: Application of Carrier Common Line Charges to Partial Facilities-based ICs reselling MTS and MTS type services.

ECA TARIFF REFERENCE: Section 3.3(D)

OTHER TARIFF REFERENCES: Provision cross-referenced by all access tariffs.

TARIFF LANGUAGE:

"(D) When the IC plans to use Switched Access Service (line side and/or trunk side) provided as set forth in 6.7.3 following in association with the resale of an IC service that is provided through the use of Dedicated Access Line Service provided under this tariff (i.e., resale of WATS), the Carrier Common Line Access rates and charges as set forth in 3.8 following apply in accordance with the regulations as set forth in 3.7(D) following."

ISSUES: The section provides for application of a complex allocation formula for resale of WATS in association with Switched Access Service. The purpose of this allocation is apparently to provide credit for Carrier Common Line Charges payable through metered WATS usage. No credit is given for resale of MTS in combination with Switched Access Service. This may result in application of Carrier Common Line charges to resold MTS and MTS-type service minutes, despite the fact that resellers of these services have already paid Carrier Common Line charges as a component of their MTS usage charges. (USTEL).

DISCUSSION: Section 69.105 of the Commission's Access Charge Rules states that Carrier Common Line charges shall not be assessed upon ICs to the extent that they resell MTS, WATS, or the MTS/WATS-type services of other common carriers. 47 C.F.R. § 69.105. The tariff apparently attempts to accomplish this by exempting pure MTS/WATS and MTS-type resellers from carrier common line charges, *see supra* discussion of § 3.3(A), and by referencing a complex allocation formula set forth in Section 3.7(D) for resellers of WATS who also use Switched Access service "in association with" the resold WATS. *See infra* discussion of § 3.7(D). No provision deals directly with resold MTS or MTS-type services, when those services are resold in combination with Switched Access Service. Because we are not aware of any resale activity involving MTS, we will not require that an allocation system be devised at this time. Should the need for specific formulas develop, however, we expect that telcos will devise a practicable formula and would revise their tariffs accordingly. Finally, in order to avoid potential confusion, the last sentence of Section 3.3 should be revised to indicate

that Carrier Common Line Access charges are *calculated* in accordance with the regulations as set forth in Section 3.7(D).

SUBJECT: Carrier Common Line Service — Obligation of the IC to report intrastate, WATS resale and exchange usage data.

ECA TARIFF REFERENCE: Section 3.4 (C), (D), (F), (G); *see also* § 6.7.3.

OTHER TARIFF REFERENCES: Section 3.4 cross-referenced by all access tariffs; provisions identical to Section 6.7.3 found in essentially all access tariffs.

TARIFF LANGUAGE:

These provisions require ICs to report the number of access minutes used in providing intrastate service, the number of lines with greater than 2500 minutes of WATS usage resold "in association with" switched access service, and the number of access minutes used in providing "service which is defined by the appropriate Regulatory Commission to be an exchange service." Where an IC reports these types of use, the Telco will apply credits according to various cross-referenced regulations found in other sections of the tariff. Section 3.4(C) provides that, unless this data is supplied by the IC, all Switched Access Service provided under the tariff ordered by the IC will be subject to Carrier Common Line Access Charges.

ISSUES: Commenters contend that the reporting requirements contained in this section are unreasonably intrusive. (LC, MCI) In addition, the application of carrier common line charges to ICs failing to supply data may be in violation of the access charge rules.

DISCUSSION: The reporting requirements imposed by these provisions are intended to allow the telco to assess charges on ICs in circumstances where the telco cannot readily determine the nature of particular calls or particular lines used by the IC, and therefore, cannot determine the correct charges to be applied.

We have already discussed issues raised with respect to intrastate jurisdictional reports in our discussion of Section 2.3.14, *supra.* Our disposition of those issues will therefore apply to Section 3.4(D). The same problems appear to occur with respect to reporting requirements for IC intraexchange usage. Accordingly, our disposition of Section 2.3.14 will apply to Section 3.4(G) as well.

With respect to WATS usage data, however, it appears that a more limited form of reporting requirement should be imposed on ICs who obtain access under flat, rather than usage based access charges. Here, the telco would merely need to obtain the number of WATS minutes used, in order to determine the number of lines in a multiline hunt group to be accorded local business line rate treatment. *See infra* discussion of § 3.7(D). In cases where the telco provides billing and collection services for the provider of WATS, it would appear that this information would be available to the telco internally, and no reports from the IC would be necessary. With respect to other circumstances, however, the tariff may only provide that the IC is to supply documentation of WATS usage. No "records, workpapers or backup documentation" would be necessary.

SUBJECT: Carrier Common Line Service — Authorization of the telco or carrier common line billing entity to inspect and audit IC records.

ECA TARIFF REFERENCE: Section 3.4(H)

OTHER TARIFF REFERENCES: Provision cross-referenced by all access tariffs

TARIFF LANGUAGE:

"(H) When the IC notifies the billing entity that Switched Access Service is to be used as set forth in (D), (F) and (G) preceding and 6.7.3 following, the notification automatically authorizes the billing entity the right [sic] to audit the IC terminal locations to verify the use of facilities as the IC has reported in (D), (F) or (G) preceding or 6.7.3 following and all of the records, workpapers and backup documentation for each report as set forth in (D), (F) or (G) preceding or 6.7.3 following and contact and review the records of other entities involved to verify the data the IC reports is accurate. All of the records, workpapers and backup documentation for each report furnished to the billing entity as set forth in (D), (F) or (G) preceding or 6.7.3 following shall be available for one year from the date of the report and shall be made available during normal business hours at an IC location in the involved LATA upon reasonable request by the billing entity in order to permit a review by the billing entity auditor or outside auditor under contract to the billing entity. If the records, workpapers and backup documentation are not provided or are insufficient or not in accordance with the provision of this paragraph and (D), (F) and (G) preceding and 6.7.3 following, the adjustments as set forth in 3.7(D), 3.7(E) and 3.7(F) following shall not apply until the deficiencies are corrected and new reports as set forth in (D), (F) and (G) preceding and 6.7.3 following are delivered to the billing entity."

ISSUES: MCI contends that the authority granted under this section is unnecessarily broad and vague, and that the telco or billing entity has too much discretion in determining when reports are sufficient.

DISCUSSION: The auditing and inspection rights set forth in this provision are apparently intended to allow the telco or its agent to verify intrastate, intraexchange and combined access usage WATS data reported by the IC. *See Supra* discussion of § 3.4(C), (D), (F), (G). We agree that the authority purportedly granted by this provision is unnecessarily broad, and could lead to substantial abuse by the telco or the carrier common line billing entity. In particular, there appears to be no justification whatsoever for any grant of authority to audit or inspect IC premises. Moreover, the specification that reports, workpapers and backup documentation be kept available at IC business locations for production upon request is clearly unreasonable.

In addition, the authority to contact third parties under this provision must be greatly curtailed. So far as we can determine, such authority would only be necessary where a dispute arises as to the actual number of minutes of WATS resold in combined access arrangements provided under Section 6.7.3. Here, the only verification authority needed by the telco or its agent would be to contact the provider of WATS for certification that the amount of WATS usage in a given month is as reported by the IC. Therefore, this provision should be revised to state that the telco or the carrier common line billing agent may request a certified copy of the IC's WATS usage billing from either the IC or the provider of the WATS service. The provision should state that requests for these bills will relate back no more than 12 months prior to the current billing period. No other third party contacts are to be authorized by the tariff.

SUBJECT: Payment arrangements for Carrier Common Line Charges

ECA TARIFF REFERENCE: Section 3.5

OTHER TARIFF REFERENCES: Provision cross-referenced by all access tariffs

TARIFF LANGUAGE:

This provision sets forth various payment terms and arrangements for Carrier Common Line Charges.

ISSUES: MCI suggests that the payment arrangements contained in this section are vague and ambiguous.

DISCUSSION: Except for the fact that Carrier Common Line Charges are to be collected by the ECA, the payment arrangements set forth in Section 3.5 are identical to those set forth in Section 2.4.1. Accordingly, our disposition of the issues raised in connection with Section 2.4.1 shall apply to Section 3.5 in the same manner.

SUBJECT: Recourse adjustments for coin station shortages

ECA TARIFF REFERENCE: Section 3.6(D), (E)

OTHER TARIFF REFERENCES: Provision cross-referenced by all access tariffs

TARIFF LANGUAGE:

"(D) For each coin record day, the Telephone Company will subtract from the Total IC Coin Revenue an amount for coin station shortages. Coin station shortages are amounts resulting from unauthorized calling at coin pay telephone stations, use of unauthorized coins (i.e., foreign coins, slugs and improper use of U.S. pennies), unauthorized removal of coin from coins pay telephone stations and coin refunds beyond the Telephone Company's control. Such amount for coin station shortages will be developed by the Telephone Company by multiplying the Total IC Coin Revenue for each coin record day by a shortage factor. Such amount will be determined by the Telephone Company through an annual special study."

ISSUES: As filed, this provision is vague and gives no standards for the amount of coin station shortages to be assigned to ICs. (AT&T, MCI) The BOCs/CSO have proposed, however, to modify the last sentence of this provision to specify that the "shortage factor" will be determined by dividing the yearly total coin shortage amount by the yearly total coin revenue amount (i.e., total coin revenue equals the coin revenue due under exchange tariffs, state toll tariffs, and interstate toll tariffs).

The BOCs/CSO have further proposed to modify the section by the addition of new Section 3.6(E):

"(E) *Audit Provisions*

Upon reasonable written notice by the IC to the Telephone Company, the IC shall have the right through its authorized representative to examine and audit, during normal business hours and at reasonable intervals as determined by the Telephone Company, all such records and accounts as may under recognized accounting practices contain information bearing upon the determination of coin revenues for which amounts may be payable to the IC. Adjustment shall be made by the proper party to compensate for any errors or omissions disclosed by such examination or audit. Neither such right to examine and audit nor the right to receive such adjustment shall be affected by any statement to the contrary, appearing on checks or otherwise, unless such statement expressly waiving such right appears in a letter signed by the authorized representative of the party having such right and delivered to the other party.

All information received or reviewed by the IC or its authorized representative is to be considered confidential and is not to be distributed, provided or disclosed in any form to anyone not involved in the audit, nor is such information to be used for any other purpose."

DISCUSSION: The principal concern with the original wording of this provision was that the telco appeared to be left with unfettered discretion in determining the amount of the shortage factor used in deducting losses from IC coin revenue. To some extent, the proposed revisions

restrict this discretion by setting the shortage factor for IC deduction on a proportional basis to that of other services. The underlying figures for this factor, however, remain to be determined by an unspecified "special study."

In general, tariff charges that depend on extraneous materials are not acceptable under the Commission's rules. *See* 47 C.F.R. § 61.74. On the other hand, the special study used under revised Section 3.6 to determine total coin shortages and coin revenue amounts appears to be substantially similar to other studies commonly conducted by telephone companies (*e.g.* separations study). In addition, the auditing powers that the BOCs/CSO have offered to ICs under new Section 3.6(E) appear to be substantial enough to insure that the data used in special studies to determine shortage factors will be accurate. If modified as proposed, this provision appears not unreasonable and will be allowed to take effect.

SUBJECT: Carrier Common Line Service — Assumed average access minutes

ECA TARIFF REFERENCE: Section 3.7(C)

OTHER TARIFF REFERENCES: Provision cross-referenced by all access tariffs

TARIFF LANGUAGE:

This provision sets forth assumed averaged access minutes that apply when Carrier Common Line Access is provided in association with Feature Groups A, B and E end office switching in exchange carrier end offices that are not equipped for measurement of actual access minutes. When neither originating nor terminating minutes can be measured, the assumed averaged access minutes are set at 4076 originating and terminating minutes of use. In cases where either originating or terminating minutes can be measured, but not both, a smaller number of access minutes is assumed. These assumed average access minutes are to apply except in cases where a different amount of assumed average access minutes is specified under Section 6.7.8.

ISSUES: Commenters contend that the use of assumed average access minutes unfairly gives the telco the power to set minimum orders (USTEL); and that the ECA should justify the choice of 4076 originating and terminating minutes as an assumed figure, since the ENFIA average use estimate was considerably higher (AT&T). In addition, the use of assumed average access minutes to calculate Carrier Common Line charges places the burden of measurement on ICs, and may represent a hardship if improperly applied to end users of FX services.

DISCUSSION: In light of the Commission's decision on *Second Reconsideration* to apply a flat per-line exchange access charge to OCCs, it would appear that questions associated with application of assumed access minutes to ICs using Feature Group A and B Switched Access Services need not be addressed at this time. The prospective application of carrier common line charges to FX customers based on 4076 assumed minutes, however, would appear to represent a substantial hardship to some FX users. We believe that a more reasonable approach in these circumstances would be to use a fully justified assumed figure that more accurately approximates FX usage. Alternatively, an interstate rate equivalent to the generally applicable local business exchange rate may be used.

SUBJECT: Carrier Common Line Service — Limitation of Access Minute Credit for resold WATS services

ECA TARIFF REFERENCE: Section 3.7(D); *see also* §§ 3.2(E), 6.7.3

OTHER TARIFF REFERENCES: Provision cross-referenced by all access tariffs

TARIFF LANGUAGE:

"(D) When the IC orders Switched Service Access (line side and/or trunk side) as set forth in 6.7.3 following and reports the data as set forth 3.4(F) preceding and in 6.7.3 following, the IC monthly Transitional Charge access minutes will be adjusted as follows:

(1) For the first month both the Switched Access Service and the resold Dedicated Access Line Service provided under this tariff are in service in the same state in the same LATA and provided by the same Telephone Company, the Carrier Common Line Access originating access minutes for the IC LATA account or End Office account involved, whichever type of account is used by the billing entity, will be adjusted as follows. After the billing entity verifies that the number of Dedicated Access Line Services in service as reported by the IC is accurate, the Carrier Common Line Access originating access minutes developed for the IC account involved will be reduced by an amount of minutes equal to the number of resold Dedicated Access Line Services reported as set forth in 3.4(F) preceding for trunk side Switched Access Service and 6.7.3 following for line side Switched Access Service times 2500. The adjustment will be made to the involved IC account no later than either the next bill date, or the one subsequent to that, depending on when the report is received."

ISSUES: The provision limits the maximum credit for resold WATS service to 2500 minutes per line, and by requiring a minimum of 2500 minutes usage per line, also limits the number of lines reported for credit. Commenters contend that there is no reason to so limit the maximum or minimum credit for resold WATS. (ICA, MCI, SBS, USTEL)

DISCUSSION: Section 69.5 of the Access Charge Rules states that most carrier's carrier charges (including Carrier Common Line charges) shall not be payable by an IC "to the extent that it resells service for which the charges have already been assessed (e.g. MTS, WATS, and the MTS/WATS type service of other common carriers)." 47 C.F.R. § 69.5. Inasmuch as Section 3.7(D) of the ECA tariff requires WATS resellers to use at least 2500 minutes of WATS service before reporting for credit, and moreover, limits the maximum amount of that credit to 2500 minutes per line, the provision is contrary to our Rules and must be revised. In cases where carrier common line charges are assessed on a usage basis, there appears to be no reason for limiting the minimum or maximum number of access minute credits available for WATS resale.

Under the Commission's *Second Reconsideration* decision, charges for OCC access under Feature Groups A and B will be assessed on a flat, per line basis. In these cases, where an IC obtains Switched Access Service on a flat rate basis and commingles that access with WATS access in a multiline hunt group arrangement,* it would appear that some allocation formula would be necessary to determine what rates apply to the lines within the hunt group. The tariff must make clear, however, that this billing arrangement applies only in determining the proper allocation of per line charges with respect to commingled combined access arrangements. *See infra* discussion of § 6.7.3.

The system developed in the ECA tariff allocates line charges according to the number of WATS lines with at least 2500 minutes of WATS usage. That is, for each "qualifying" WATS line (i.e. a WATS access line with at least 2500 minutes of use), one line in the multiline hunt group will receive local business rate treatment. To this extent, the ECA plan would incorporate arrangements developed in BSOC Tariff F.C.C. No. 11. Because BSOC 11 has proven to be a workable billing arrangement under prior tariff environments, the allocation system used there may be duplicated here. It must be quite clear, however, that this is merely

* A multiline hunt group is a grouping of lines that can be sequentially accessed in the incoming direction when the assigned telephone number of the hunt group is dialed. *See* AT&T Co., Mimeo No. 613, released May 4, 1982.

a billing arrangement used in determining the proper line charge to be applied to combined access arrangements provided as set forth in Section 6.7.3. It is not an independent statement of rates. Moreover, where local exchange service is measured, these provisions should state that the average usage per local exchange line will be used for billing purposes.

SUBJECT: Adjustments to Carrier Common Line Usage for Non Premium Access

ECA TARIFF REFERENCE: § 3.7(G)(2)

OTHER TARIFF REFERENCES: Provision cross-referenced by all access tariffs

TARIFF LANGUAGE:

"(2) The access minutes for a Non Premium Access Carrier will be multiplied by the Transitional Charge as set forth in 3.8 following and

0.65 for access minutes in 1984,
0.77 for access minutes in 1985,
0.88 for access minutes from January 1, 1986 thru August 31, 1986

to determine the charges."

ISSUES: The discount for non-premium access in this provision applies only to non-premium access *carriers*. AT&T, the only carrier receiving premium access at this time, suggests that it should receive an access minute discount for line-side terminations (e.g. FX access) which it claims are identical with access provided to non-premium access carriers. MCI claims that the discount amounts are insufficient to reflect the relative values of premium/non premium access.

DISCUSSION: Issues relating to the amount of the non-premium discount and non-premium access received by AT&T have been addressed in the *Second Reconsideration*. This section should be adjusted accordingly.

In order to avoid potential confusion, discount percentages for the years 1985 and 1986 should not be included in the current tariff.

Section 4. End User Access Service

End User Access Service is closely related to Carrier Common Line Access Service, which is provided under Section 3 of the ECA tariff. As discussed above in connection with that section, the *Access Charge Order* contemplated that interstate costs associated with non-traffic sensitive exchange plant jurisdiction would be recovered by a combination of carrier's carrier charges and end user charges. At present, almost all of these costs are assigned to ICs. As a result, end users pay about 15 cents per minute, as part of long distance rates, to defray these costs. Under the access charge plan, however, these costs are to be gradually assigned directly to end users, who will pay an end user charge under Section 4 of the exchange carrier's access service tariffs. Eventually, we expect that more of the NTS costs allocated to the interstate jurisdiction (with the exception of the pay telephone element and costs associated with the Universal Service Fund) will be recovered from end users directly through the End User Common Line element, although we intend to monitor the

effects of these charges and, if necessary to maintaining a proper balance of our policy goals, amend this approach.

Unlike the carrier common line charge, end user charges are to be assessed upon a flat rate (i.e. non-usage sensitive) basis. This approach more accurately reflects the non-usage sensitive character of these costs. Under the *Access Charge Order* and *First Reconsideration Order*, end user charges in 1984 would have applied to all residential and business lines, in amounts ranging from $2.00 for residential users to $6.00 for business users per month. Under the *Second Reconsideration Order*, however, imposition of end user access charges on residential and single line business subscribers will be delayed pending further study. Multiline business subscribers will still be subject to the charge. We are requiring the ECA and Telcos filing access tariffs to implement this decision as indicated below.

In addition to the changes made necessary by the *Second Reconsideration*, there appear to be several additional problems within Section 4 of the ECA Tariff. In these cases, we have suggested alternative tariff language to avoid problems of vagueness and incorrect applications of End User Common Line charges.

SUBJECT: End User Access Service — General Description

ECA TARIFF REFERENCE: Section 4.1

OTHER TARIFF REFERENCES: Essentially identical provisions in all access tariffs

TARIFF LANGUAGE:

"End User Access provides for the use of an End User Common Line (EUCL) by an End User to make and receive interstate calls."

DISCUSSION: The definition set forth in Section 4.1 is at variance with the Commission's rules. Section 69.104(a) of the Commission's Rules and Regulations states that End User Common Line Charges are to be assessed upon end users that subscribe to local exchange telephone service. 47 C.F.R. § 69.104(a). The end user's use of the common line to make and receive interstate calls is irrelevant. Accordingly, the phrase "to make and receive interstate calls" should be deleted from this Section of the tariff.

SUBJECT: End User Access Service — Undertaking of the Telephone Company

ECA TARIFF REFERENCE: Section 4.3(B)

OTHER TARIFF REFERENCE: Essentially identical provisions in all access tariffs.

TARIFF LANGUAGE:

"(B) The Telephone Company will be responsible for contacts and arrangements with end users for EUCL charges".

DISCUSSION: This provision appears to be redundant with Section 4.6(A), which provides for the billing of end users by the telco. Thus, this provision implies that some contacts and arrangements other than billing of end users will be within the responsibility of the telco.

These additional responsibilities, if they exist, are not explained in the tariff. Because there is substantial doubt as to the meaning and applicability of this provision, it should be explained or deleted.

SUBJECT: End User Access Service — Obligations of the End User and the IC

ECA TARIFF REFERENCE: Section 4.4(A)

OTHER TARIFF REFERENCES: Essentially identical provisions in all access tariffs

TARIFF LANGUAGE:

"(A) The End User, when it orders local telephone exchange service, authorizes the Telephone Company to provide End User Access except for local telephone exchange service where a waiver of the End User Access charge has been granted by the F.C.C."

DISCUSSION: Section 61.55(f) of the Commission's Rules and Regulations requires tariffs filed with this Commission to contain "such explanatory statements in clear and explicit terms regarding the rates and regulations contained in the tariff as may be necessary to remove all doubt as to their proper application." 47 C.F.R. § 61.55(f). This tariff provision, as currently worded, appears confusing and does not meet the standard of clarity imposed by Section 61.55(f). Moreover, in light of the Commission's *Second Reconsideration* decision to delay imposition of residential and single line business end user charges, the reference to waivers of End User Access Charges should be deleted. Accordingly, Section 4.4(A) should be revised to read as follows:

"Each End User of Local Exchange Service will be charged an End User Access Charge."

SUBJECT: End User Access Service — Obligations of the End User and IC

ECA TARIFF REFERENCE: Section 4.4(B)

OTHER TARIFF REFERENCES: Essentially identical provisions in all access tariffs. *But see* The Pacific Tel. & Tel. Co. Tariff F.C.C. No. 128

TARIFF LANGUAGE:

"(B) The End User shall be responsible for all contacts, arrangements and charges with the IC or other entity concerning the service or arrangements accessed or terminated by the [End User Common Line]"

DISCUSSION: There appears to be no reason for this provision to appear in this tariff. Certainly, the telco would not be responsible for arrangements between ICs and end users under normal circumstances. Moreover, this provisions appears to contradict other provisions of some access tariffs. For example, where the telco offers billing and collection services on behalf of ICs, this service would appear to involve contacts between the telco and end users on behalf of ICs. Because this provision is unnecessary and misleading it should be deleted from the tariff.

The access service tariff of at least one telco (Pacific Tel. & Tel.) adds to this provision an exemption for public or semi-public telephone users, but not semi-public telephone subscribers. This exception is no less ambiguous than the main text of the provision, and should be deleted as well.

SUBJECT: End User Common Line Charges—Rate Regulations for Centrex-CO

ECA TARIFF REFERENCE: Section 4.6(C)

OTHER TARIFF REFERENCE: Essentially identical provisions in all access tariffs.

TARIFF LANGUAGE:

"(C) For business Centrex and Centrex-like service lines or trunks installed or on order prior to July 28, 1983 and Centrex Dormitory (Residence) Service, the EUCL Residential-Individual Line or trunk rate as set forth in 4.7 following applies."

DISCUSSION: In the *First Reconsideration*, we concluded that "embedded" Centrex-CO service lines should pay monthly per line end user charges equal to charges assessed residential end users. *First Reconsideration* at para. 48. The *Second Reconsideration* maintained the lower charge for embedded Centrex-CO lines, but set a schedule for phasing-up the charge independent of whatever action is taken with respect to residential and single line business end user charges. Accordingly, this provision should be revised to account for those changes in Centrex-CO charges.

In addition, Section 4.6(C) presents problems of ambiguity in that it refers to "business Centrex" and "Centrex-like service lines or trunks" without providing definitions for those terms. This may cause uncertainties as to the application of Centrex charges. For example, under the present wording, Centrex charges may be improperly applied to Centrex-CO, which does not make the same use of local lines.

As we understand the problem, there are several state-tariffed Centrex systems that have been marketed under such names as ESSX, Centron and Centraflex as well as Centrex-CO. Apparently, the reference to "Centrex-like services" in the ECA tariff is intended to accommodate these various local service offerings. Nevertheless, the ECA tariff should make clear what systems are to be accorded Centrex rate. Also, the provision should be clarified with respect to Centrex Dormitory (Residence) Service. Because this term is undefined in the tariff, it is impossible to determine whether this service would be limited to residential services within the meaning of the Commission's access charge rules. *See* 47 C.F.R. § 69.203(d).

SUBJECT: End User Common Line Charges

ECA TARIFF REFERENCE: Section 4.7

OTHER TARIFF REFERENCES: Essentially identical provisions in all access tariffs.

TARIFF LANGUAGE:

(A) End User Common Line (EUCL) – Residence

	USOC	*Rates Per Month 1-1-84 Thru 12-31-84*
– Individual line or trunk, each	9ZR	$2.00
– Two-party, each party	9ZR	1.21
– Four-party, each party	9ZR	0.61

(A) End User Common Line (EUCL) – Residence

	USOC	Rates Per Month 1-1-84 Thru 12-31-84
– Eight-party, each party	9ZR	0.53
– Ten-party, each party	9ZR	0.51
– Semi-public line, each	9ZR	2.00

(B) End User Common Line (EUCL) – Business

	USOC	Rates Per Month 1-1-84 Thru 12-31-84
– Individual line or trunk, each	9ZR	$6.00
– Two-party, each party	9ZR	3.64
– Four-party, each party	9ZR	1.83
– Eight-party, each party	9ZR	1.59
– Ten-party, each party	9ZR	1.54
– Semi-public line, each	9ZR	6.00

DISCUSSION: In view of the Commission's decision on *Second Reconsideration*, charges for residence End User Common Lines should be deleted. In addition, the tariff should specify that the Business EUCL charges apply on a per-line basis only to multi-line business subscribers.

Section 5. Ordering Options for Switched and Special Access Service

Section 5 of the ECA access tariff contains the regulations and nonrecurring charges related to ordering either Switched or Special Access Service. The *Access Charge Orders* gave only general guidance on these provisions. In the *First Reconsideration Order* we stated that we would scrutinize closely nonrecurring charges for planning, developing and installing facilities used by ICs. We have done just that in reviewing this section to assure that its provisions are just and reasonable, not unreasonably discriminatory in favor of existing ICs and in compliance with Parts 61 and 69 of the Commission's Rules. Of particular concern to us was whether the individual proposed charges were adequately supported by the cost data filed under Section 61.38 of the Rules.

This section proposes two ordering mechanisms: an Access Order and a Planned Facilities Order (PFO). The Access Order may be used by the customer to order Switched or Special Access facilities from available inventory, or to make changes to existing services. The customer uses a PFO, on the other hand, to order facilities that are not in inventory. This means that the facilities are constructed to order for the customer and made available at a future date. Once an Access Order or PFO is accepted by the telco, it can be modified or cancelled before the facility is placed in service, subject to certain restrictions and charges. The charges and regulations contained in Section 5 apply to such modifications and cancellations. For example, a "Service Date Change Charge" applies when the customer desires to change the service date which was specified in the

Access Order, while an "Expedited Order Charge" is imposed when the changed date is prior to the original service date. A "Design Change Charge" applies to any modification of the Access Order that requires engineering review. In addition to modifying an Access Order, a customer may partially or entirely cancel an order at any time prior to the date service is provided, but cancellation charges are imposed. Finally, Section 5 establishes minimum periods for which Switched and Special Access Service facilities are provided.

We received numerous comments about the proposed Section 5 provisions. The commenters complained generally that the ordering provisions were excessively restrictive and burdensome, especially when applied to new carriers trying to enter the interexchange market. For example, the proposed six month minimum service period for ordering Access Service was said to unduly restrict a carrier's ability to respond to changes in the interexchange market. The commenters further complained that the proposed charges related to modifying or cancelling an Access Order were excessive and not cost-justified. Many of the criticisms expressed by the commenters related to the PFO process. They criticized the ECA proposal that Planned Facilities be ordered from 24 to 36 months in advance, and that minimum monthly service charges be applied to such facilities for 24 months after they became available. The commenters further complained about the ECA proposal to require 12 months of service charges as an advance payment for ordered Planned Facilities.

In addition to the problems raised by the commenters, we have our own concerns about the PFO process. As noted above, this process is used by a telco customer to order facilities that are not in inventory. The services and facilities ordered through this process, however, are no different from those provided through the regular ordering process. This conclusion is supported by several references in the ECA tariff to the conversion of Planned Facilities to regular facilities provided pursuant to an Access Order, and vice versa (See, *e.g.* §§ 5.4.11 and 5.5.7). Thus, the only distinction between Planned Facilities and regular facilities is that in some instances the telco may have the requested facilities in inventory, while in others it may not.

No explanation is given in the ECA tariff or support materials of how the telco will decide what facilities are provided from inventory and what facilities must be planned and constructed. For example, while facilities used to provide local exchange service could be used to provide Access Service, the tariff does not indicate when facilities might be moved from another service classification to the Access Service classification to fill an Access Order. Thus, the telco would be in a position to require any of its customers to obtain Access Service under the PFO process, which is similar to special construction, even if the facilities were already planned

or available in inventory but designated for another service classification. This could result in different customers paying different charges for the same service. It also vests broad discretion in the telco to decide which rates it will charge by how it plans its inventory. For example, for non-inventory PFOs it would receive substantial advance payments not charged for inventory Access Orders.

The PFO process also gives the telco an opportunity to shift to its customers virtually all the burden of planning and investing in facilities, which is a basic common carrier responsibility. While the telco is not expected to accommodate "extraordinary" requests for facilities, it is expected to meet demands that are "reasonable." This expectation, in fact, is embodied in the requirement of Section 201(a) of the Communications Act that a carrier furnish service upon reasonable request. In the normal course, a telco has an inventory of facilities, as well as facilities held for future use and facilities under construction. Moreover, as noted above, facilities in inventory which are generally fungible can be transferred from one service to another. When inventories appear low in relation to demand forecasts made by the telco, the company will plan additional facilities to meet future demand. The PFO process, however, would enable the telco to alter this course and charge its customers for generally available common carrier service as though the customer ordered facilities requiring special construction.[1] It would be essentially the telco's choice as to which customers pay charges associated with inventory Access Orders and which pay special construction charges associated with non-inventory PFOs. Potentially, a small IC, for example, needing only a few circuits could be required to order under the PFO procedures, while a large carrier or non-carrier ordering hundreds of circuits could obtain its facilities from inventory. It cannot be said, therefore, that the Planned Facilities rates and regulations would in any way be related to the actual costs or additional business risks incurred by the telco. They would simply enable it to establish substantial and perhaps insurmountable barriers to entry into the interexchange market and to engage in unjust discrimination.

In sum, then, the PFO process could allow a telco to avoid its responsibilities as a common carrier and to engage in unreasonable discrimination among customers. Cooperation between telcos and ICs in facilities planning will be necessary. Telcos may reasonably require non-discriminatory ordering charges and, when needed to protect themselves against the exceptional financial risks of large or unique service requests, advance payments and termination charges. However, the PFO provisions

[1] Under the PFO provisions, the customer has the same obligations that it has when ordering special construction – the customer has to pay any unrecovered costs if the telephone company is unable to reuse the Planned Facilities.

proposed in this tariff are one-sided, arbitrary and over-broad in their application. Therefore, we are rejecting all proposed tariff provisions which relate to the PFO process as unreasonable and potentially discriminatory.

In the *Second Reconsideration Order*, we decided to prescribe a transitional flat per line charge for ICs other than AT&T for access to a telco switch, in lieu of the usage based charges prescribed previously. Because of this change, these ICs will order lines rather than circuit capacity. Thus, certain of the ordering procedures for Switched and Special Access Service must be made consistent with this decision. For example, the proposed tariff provides that access facilities be ordered on the basis of busy hour minutes of capacity (BHMC) to particular end offices. (See § 5.2.) We are requiring the telcos to provide Feature Group A (FGA) and B lines to ICs other than AT&T on the basis of circuit quantities. In the *Second Reconsideration Order*, we also allowed AT&T to obtain FGA for the provision of FX service at the same per line charges as other ICs. Accordingly, references to BHMC in these and any other Section 5 provisions should be modified. (See discussion of nonrecurring charges in Order, *supra*.)

SUBJECT: Ordering Conditions

ECA TARIFF REFERENCE: Section 5.1.1

TARIFF LANGUAGE !fo(in part):

> "The IC shall supply all the necessary information to provide service, e.g., IC name and terminal location, end user name and location, facility interface, etc."

ISSUES: MCI requests that Section 5.1.1 be modified to make clear that only Special Access customers' names will be supplied by the IC.

DISCUSSION: The wording of the above provision gives the telco discretion to require that an IC provide information about its customers that is not necessary to place access facilities in service. This is the only reason why the telco should need information about an IC's customers. Requiring information which is not needed for planning and implementing facilities is unreasonable and could intrude on the privacy of those customers. This entire provision should either be reworded to make clear that the IC is only required to provide information necessary to get access facilities in place (*e.g.*, circuit and location information) or be deleted.

SUBJECT: Special Construction

ECA TARIFF REFERENCE: Section 5.1.3

TARIFF LANGUAGE:

> Special Construction is not an ordering option, but may be applied to either an Access Order or a Planned Facilities Order to accommodate an IC request. When special construction is required, the IC will be so notified. If the IC agrees to the special construction, a firm order

will be established. If the IC does not want the service or facilities after being notified that special construction is required, the order will be withdrawn and no charges will apply.

The regulations, rates and charges for special construction are set forth in EXCHANGE CARRIER ASSOCIATION TARIFF F.C.C. NO. 3 and are in addition to the regulations, rates and charges specified in this section."

DISCUSSION: Under this provision, the customer is only notified that special construction is required. It is not given an estimate of the special construction charges or informed as to why special construction is required. Such an estimate of the charges is necessary before the customer can make an informed decision on whether or not to order facilities requiring special construction. Further, the tariff statement that special construction "may be applied" gives the telco too much discretion. The language of this provision should therefore be rewritten to: (1) remove this discretion; and (2) provide that the telco will give the customer an estimate of special construction charges and justification for why special construction is needed.

SUBJECT: Access Order

ECA TARIFF REFERENCE: Section 5.2 (Issue A)

TARIFF LANGUAGE (in part):

"The Telephone Company shall determine whether special construction charges apply and will so notify the IC prior to establishing a firm order."

DISCUSSION: This provision repeats information contained in Section 5.1.3, discussed *supra* at page 5-5. It should therefore be eliminated as duplicative of another tariff provision.

SUBJECT: Access Orders

ECA TARIFF REFERENCE: Section 5.2 (Issue B)

TARIFF LANGUAGE (paraphrased):

Section 5.2 provides, in part, that when placing an order for Access Service, the IC must specify the number of busy hour minutes of capacity (BHMC) from the IC terminal location to each end office by Feature Group and by type of BHMC.

ISSUES: The commenters complain that the BHMC ordering requirement deviates from the current ENFIA ordering procedure whereby ICs order circuit quantities which are capable of carrying different amounts of traffic, rather than circuit capacity. (LC, USTEL, EMX, ASC, ICA, TSC/SI, SBS, ISACOMM, MCI, WU, RCA and Allnet.) The proposed requirement is said to favor AT&T, which can easily and accurately predict its BHMC to particular end offices.

The BOCs/CSO state in their reply that the commenters' objections are based on a misinterpretation of the tariff. They claim that for FGA line-side connections, the IC is only required to order to one end office in the LATA to obtain access to the entire LATA.

DISCUSSION: While we have concerns about the competitive implications of the BHMC forecasting requirement, we need not address those concerns at this time. In view of the Commission's decision on reconsideration to prescribe for ICs other than AT&T a flat per line charge for access, rather than a usage based charge, the proposed BHMC ordering requirement is no longer practical. If these ICs are charged for access on a per line basis, ordering of access facilities should be on a per line basis as well. Therefore, this tariff should be amended to allow ICs other than AT&T to order FGA and FGB Switched Access Service in circuit quantities, as they presently order ENFIA. Since AT&T now orders local access facilities by specifying circuit capacity, rather than circuit quantity, the ECA may retain the BHMC ordering requirement for AT&T in ordering FGC connections. We will hold in

abeyance the BHMC ordering requirement issue as it relates to ICs other than AT&T pending equal access being made available. We note in this regard that, as discussed in Section 2, *supra*, the methodology used to determine BHMC must be clearly expressed.

SUBJECT: Access Order

ECA TARIFF REFERENCE: Section 5.2 (Issue C)

TARIFF LANGUAGE (in part):

"For all Special Access Services, except Dedicated Access Line Service, the IC must specify the IC terminal location and end user premises or Hub, the type of service (e.g. Narrowband 1, Voice Grade 3, High Capacity 1, etc.) and the facility interface combination."

DISCUSSION: The wording of this provision, like the wording of Section 5.1.1, discussed *supra* at page 5-4, gives the telco discretion to require that an IC provide information about its customers that is not necessary to place access facilities in service. Information required by the telco should be limited to the minimum information necessary to place access facilities in service. Requiring this broader information is therefore unreasonable. This provision should either be reworded to make clear that an IC is only required to provide information necessary to get access facilities in place, or be deleted. If it is rewritten, the ECA must also clarify that the IC need only specify the type of service being ordered under the tariff, rather than the type of service it is providing to its own customers. The telco would have no need for this latter information. Finally, the reference in this provision and other provisions in this section to Dedicated Access Line Service should be deleted in accordance with the *Second Reconsideration Order*.

SUBJECT: Access Order Service Date Intervals—Standard Interval

ECA TARIFF REFERENCE: Section 5.2.1(A)

TARIFF LANGUAGE (in part):

"The Telephone Company shall publish, and make available to all ICs, a schedule of Standard Intervals applicable for Switched and Special Access Service."

ISSUES: Several commenters complain that the tariff does not include the schedule mentioned above, and that this oversight is critical. (Allnet, EMX, ICA, USTEL and ASC.)

DISCUSSION: Omission of the schedule of standard ordering intervals gives telcos considerable discretion to determine when they will or will not provide service to their customers. Such discretion could be exercised in a manner to: (1) favor established carriers which already have facilities over potential entrants into the interexchange market; or (2) if facilities are scarce, to allocate them unfairly among existing customers. Moreover, omission of this schedule results in the telcos' customers being given inadequate advance notice of the length of time necessary to order particular facilities.

For these reasons, we are requiring that the ECA publish in this tariff a schedule indicating the length of time necessary to order access facilities. All types of access facilities offered under the access tariff should be included in this schedule. In addition, the schedule should include justification for the length of time required to provide all of these facilities. Because of the length of time required to compile such a schedule, the ECA need not include it until the 1985 tariff filing.

SUBJECT: Access Order Service Date Intervals — Negotiated Interval

ECA TARIFF REFERENCE: Section 5.2.1(B)

TARIFF LANGUAGE (in part):

"(B) The Telephone Company will negotiate a service date interval with the IC when:

(1) There is no Standard Interval for the service and the Short Notice Interval is not applicable, or

(2) The IC requests a service date beyond the applicable Standard Interval service date.

The Telephone Company will offer a service date based on the type and quality of services the IC has requested. The Negotiated Interval may not exceed by more than 30 days the Standard Interval service date, or, when there is no Standard Interval, the Telephone Company offered service date.

When the Negotiated Interval is shorter than that which the Telephone Company originally offered, additional charges, including but not limited to special construction charges and charges set forth in 13 following for Additional Engineering and Additional Labor may also apply.

All part-time Television and Program Audio services are provided with a Negotiated Interval. Each service is subject to a *service inquiry*. The service inquiry process determines the feasibility of the desired service date."

ISSUES: Several commenters complain that the 30 day ordering limit is unreasonable and unjustified. (LC, MCI and USTEL.) ENFIA orders are now said to be accepted by the BOCs based on a 24 day standard ordering interval, but additional advance ordering is allowed, which gives the ICs up to a total ordering period of 6 months. MCI, Allnet and USTEL further complain that this provision is vague and ambiguous.

DISCUSSION: In their reply, the BOCs/CSO agreed to modify this proposed provision to allow an IC to place an Access Order six months in advance of service. We will allow this modification to be made. No reasonable basis exists for prohibiting orders for future service that extend more than 30 days from the Standard Interval date. Such orders should in fact simplify both planning and meeting Access Order dates. Telcos may protect themselves against ICs that continually change service dates by imposing a reasonable, nondiscriminatory, cost-based Service Date Change Charge.

Other changes to this provision are necessary. The next-to-last paragraph in this provision relates to situations that are covered by the Expedited Order Charge, discussed *infra* at page 5-17. This language should be moved to Section 5.2.2(D), where this charge is established.

In the last paragraph, we question why part-time Television and Program Audio services are not provided with the Standard Interval. On its face, the different treatment of these services is discriminatory and should either be justified or eliminated. The term "service inquiry" used in this provision should also be defined.

SUBJECT: Access Order Service Date Intervals—Short Notice Interval

ECA TARIFF REFERENCE: Section 5.2.1(C)

TARIFF LANGUAGE:

"(C) *Short Notice Interval*

(1) The following types of Access Service will be available to an IC on a Short Notice Interval:

(a) Access Service required for short term Regional, National and International Special Events, including sports and entertainment, news coverage and conventions, or

(b) Access Service required for the Government for Command and Control Communications and National Security and Emergency Preparedness.

(2) Access Service required for the Government will be provided on the date requested, or as soon thereafter as possible, when the emergency falls into one of the following categories:

(a) State of crisis declared by the National Command (includes commitments made to the "National Plan Authorities for Emergencies and Major Disasters"), or

(b) Efforts to protect endangered U.S. personnel or property both in the U.S. and abroad (includes space vehicle recovery and protection efforts), or

(c) Communications requirements resulting from hostile action or a major disaster or civil disturbance, or

(d) The Director (Cabinet Level) of a Federal Department, Commander of a Unified/Specified Command, or Head of a Military Department has certified that a communications requirement is so critical to the protection of life and property or to the National Defense that it must be processed immediately, or

(e) Political unrest in foreign countries which affects the National Interest, or

(f) Presidential Service.

(3) For Short Notice Interval Access Orders, the nonrecurring charge is two times the appropriate nonrecurring charges for the service provided as set forth in other sections of this tariff."

ISSUES: The commenters say that no explanation is given as to why only certain customers are subject to the Short Notice Interval for ordering access facilities. (HTN, the Networks and FEA.) They also complain that the doubling of nonrecurring charges for facilities ordered under the Short Notice Interval is unjustified and unreasonable because not related to cost-recovery.

DISCUSSION: This provision contains numerous problems. For example, on its face (C)(1)(a) is vague and ambiguous. There is no definition of "short term" as it applies to the types of access uses referenced here (*e.g.*, sports, news, and entertainment events and conventions). Furthermore, requiring that access facilities for these events be ordered under the Short Notice Interval is confusing. While Access Service for such events would only be necessary on a "short term" basis, the need for the service would probably be known far in advance, rather than on "short notice" as the section title implies. In addition to the ambiguity of this provision, there is no justification for requiring that the access uses referenced here be ordered under the Short Notice Interval, rather than under the Standard or Negotiated Intervals. Because the nonrecurring charges for Short Notice Interval Access Orders are greater than those applied to Standard and Negotiated Interval Orders (double the applicable nonrecurring charges for the service), this discriminatory treatment must be justified. Accordingly, this provision should be rewritten so that it clearly indicates the types of Access Service uses to be ordered under the Short Notice Interval, and accompanied by justification for requiring that these uses be subject to short notice ordering. Otherwise, the provision must be deleted.

Subsection (C)(2), in defining the term "emergency," duplicates Section 10.2 of the tariff, which establishes what constitutes a Government emergency. That section should simply be referenced here to define Government emergency. Also, this revised provision, like (C)(1)(a), must be accompanied by justification for requiring that Government emergency uses for Access Service be subject to short notice ordering.

Finally, there is no basis given in the tariff or its support materials for determining the nonrecurring charges for Short Notice Interval Access Orders, or for doubling those charges. This information should be provided before we can determine the reasonableness of these

nonrecurring charges, as well as the reasonableness of doubling those charges for service provided under the Short Notice Interval.

SUBJECT: Access Order Modifications—Service Date Change Charge

ECA TARIFF REFERENCE: Section 5.2.2(A)

TARIFF LANGUAGE (paraphrased):

With the agreement of the telco, Access Order service dates may be changed, but the new service date may not exceed the original service date by more than 30 calendar days. If the requested service date is more than 30 calendar days after the original service date, the order is considered cancelled by the telco and reissued with appropriate cancellation charges applied. A Service Date Change Charge of $26.21 will apply, on a per order, per occurrence basis, for each service date changed.

ISSUES: The commenters argue that this provision is unreasonable and that there is no cost support for the $26.21 charge. (Allnet, SBS, the Networks, EMX, ASC, ICA, GTES, ISACOMM and USTEL.) The BOCs/CSO say in their reply that order modification charges recover costs that occur immediately, rather than over time. They claim that when a service date is changed, the change is made immediately. The Service Date Change Charge is therefore incurred on the date of the customer's request and is never included with the calculations for short notice, expedited orders or total or partial Cancellation Charges.

DISCUSSION: There is no specific information in the tariff or its support materials to explain how this charge was derived. Nor does the BOCs/CSO reply support it or address the commenters' concerns. The basis for the $26.21 charge must be provided so that we may determine the reasonableness of this provision. Otherwise, the Service Date Change Charge must be eliminated. (See discussion of this $26.21 charge in Order, *supra.*) Specifically, since all charges must reflect costs, we need to know what work activity is associated with the Service Date Change Charge and how much it costs the telco to perform that activity. In addition, the wording of this provision gives the telco too much discretion to decide when an Access Order service date may be changed. Therefore, it should be amended to set forth guidelines as to when such permission will or will not be granted.

SUBJECT: Access Order Modifications—Design Change Charge.

ECA TARIFF REFERENCE: Section 5.2.2(C)

TARIFF LANGUAGE (paraphrased):

The customer may request a design change to the access service ordered. A design change is any change to an Access Order which requires "engineering review." The Design Change Charge will apply to all Special Access Service channels or Switched Access Service BHMC. If the change involves the addition or deletion of optional features for which nonrecurring charges are stated, the Design Change Charge is equal to one-half the nonrecurring charge for each feature being added or deleted. When there is no nonrecurring charge associated with the change being made, the Design Change Charge is equal to one-half of the nonrecurring charges for the Access Service ordered. The Design Change Charge is applied on a per order, per occurrence basis.

ISSUES: Several commenters say that this charge lacks cost-justification and is unreasonable. (Allnet, ICA, SBS, ISACOMM and the Networks.) The BOCs/CSO reply that, like the Service Date Change Charge, the Design Change Charge recovers costs that occur immediately, rather than over time. This charge supposedly recovers only "the cost of the redesign and does not include the cost of any subsequent redesign activity." Thus, they say

that Design Change Charges are incurred on the date of the customer's request and are never included with the calculations for short notice, expedited orders or cancellation charges.

DISCUSSION: We have a number of problems with this provision. First, it is unclear how this Design Change Charge, which is supposedly assessed for "engineering review" of a design change, is distinguished from Additional Engineering Charges assessed under Section 13.1 for "engineering or engineering consultation." From the language of the tariff, two separate charges could be applied to the same work activity. The term "engineering review" should therefore be defined in this provision so that it is clearly distinguished from the activities charged for under Section 13.1.

We are also concerned about the Design Change Charge itself. Unlike the Service Date Change Charge, the instant charge is not a flat charge, but rather is based on the nonrecurring charges either associated with the change being made or with the Access Service ordered. As such, it assumes that a correlation exists between the nonrecurring charge for an optional feature or a service and the costs incurred by a design change to that feature or service. However, the nonrecurring charges under the access tariffs appear to be generally intended to recover all or part of the costs associated with the installation and removal of facilities, rather than the costs associated with "engineering review." Therefore, it is unclear why the Design Change Charge is based on these nonrecurring charges. Since all charges must reflect costs, the ECA should explain what work activity is associated with the Design Change Charge and how much it costs a telco to perform that activity. It would appear that certain work activities here would be the same as those associated with service date changes, discussed *supra*, and other services throughout this tariff that involve one-time or nonrecurring charges. To the extent that this is the case, charges should be made consistent with one another. If the ECA cannot supply these explanations, the Design Change Charge should be eliminated.

SUBJECT: Access Order Modifications—Expedited Order Charge

ECA TARIFF REFERENCE: Section 5.2.2(D)

TARIFF LANGUAGE:

"(D) When placing an Access Order, an IC may request a service date that is prior to the standard interval service date. An IC may also request an earlier service date on a pending standard or negotiated interval Access Order. If the Telephone Company agrees to provide service on the requested date, an Expedited Order Charge will apply.

To calculate the Expedited Order Charge, the total of all the nonrecurring charges associated with the order is divided by the number of days in the service date interval. The charge is then applied on a per day (i.e., calendar day) of improvement basis, per order.

When the request for expediting occurs subsequent to the issuance of the Access Order, a Service Date Change Charge as set forth in (A) preceding also applies.

When expediting causes the Telephone Company to incur extraordinary costs that are not recovered by the Expedited Order Charge, the IC will be billed, on an individual case basis, an amount equal to the costs incurred in lieu of an Expedited Order Charge."

ISSUES: Several commenters complain that this charge is not cost-justified and is unreasonable. (Allnet, ICA, SBS and the Networks.) MCI states that the language in the last paragraph of this provision should be modified to require the telco to advise the customer before it incurs extraordinary costs, in order to give the customer an opportunity to decide whether the telco should proceed further. In their reply, the BOCs/CSO state that when a service interval is shortened through an expedited request, service activities necessary to meet the shortened interval normally generate higher costs that should be charged to the

customer causing them. Thus, they claim that the Expedited Order Charge is "appropriate" and applies "in accordance with the costs that are incurred."

DISCUSSION: The Expedited Order Charge, like the Design Change Charge, is based on nonrecurring charges. Notwithstanding the BOCs/CSO explanation of this charge it is unclear how, in cases where a telco agrees to provide service on an earlier date, any additional costs (other than the cost of possibly changing the service date on the Access Order) are incurred. Nor is it clear how these costs are directly related to the number of days the order is to be expedited or to the nonrecurring charges associated with the service ordered. The Expedited Order Charge should therefore be accompanied by sufficient support material for us to determine whether it is cost-justified, or be eliminated. Specifically, the ECA must explain in detail what work activity is associated with expediting an Access Order and what the costs for that activity are. (See discussion of Section 5.2.2(C) at page 5-16, *supra.*) It should also explain how the Expedited Order Charge differs from special construction charges, referenced in Section 5.1.3, or additional labor charges, referenced in Section 13.2, that could be applied in situations where expediting is necessary.

The ECA should also delete the last paragraph of this provision. As we interpret that paragraph, the telco would have discretion to apply different Expedited Order Charges to different customers. We cannot allow such discretionary rate application to occur. Because this provision proposes a uniform, averaged rate for expediting Access Orders, the telcos must apply this averaged rate equally to all customers within this rate classification. They cannot apply one averaged rate to some customers and another rate, derived on an individual case basis, to other customers that cause them to incur "extraordinary costs." (Using this line of reasoning, in fact, the telcos would have to apply a rate lower than the averaged rate to those customers whose requests for expediting caused them to incur lower than average costs.) Although the carrier has the right to recover extraordinary costs (*i.e.*, costs which are not contemplated in the course of providing common carrier service), it cannot do so by charging a rate for a service which differs from the generally applicable rate in the tariff. Clearly, all tariff schedules involve a degree of averaging so that actual costs for individual services rendered will be higher or lower than the average costs used to develop the rate. One mechanism to recover extraordinary costs is through special construction, which is provided for elsewhere in this tariff and in ECA Tariff F.C.C. No. 3. To the extent that the telcos' customers who require expedition of Access Orders are different, they may establish different rate classifications for those customers. However, where a single rate classification is employed, all customers subject to that classification must be treated equally and the tariff rate must be paid by all.

SUBJECT: Access Order Modifications—Other Modification Charge

ECA TARIFF REFERENCE: Section 5.2.2(E)

TARIFF LANGUAGE (paraphrased):

Access Order modifications other than those discussed previously may be requested by the customer. If the modification can be made by the telco, an "Other Modification Charge" of $26.21 will apply on a per order, per occurrence basis. Some of the types of modifications for which this charge will apply are a change of billing address, telephone number, or Hunt Group Arrangement.

DISCUSSION: Like the charges previously discussed, the Other Modification Charge has not been supported by any cost data. (See discussion of the $26.21 charge in Order, *supra.*) Our primary concern, however, is that the activities cited as examples of "other modifications" covered by this charge are typically part of a telco's normal overhead associated with administering a service. We see no reason why the telcos should deviate from this practice in

providing Access Service and establish a separate charge for such administrative activities. Moreover, because the list contained in this provision is merely illustrative the telcos could impose an "Other Modification Charge" on virtually any administrative activity, no matter how minor. Since these activities are not set forth in the tariff, the customer would be unaware of incurring charges for them. For these reasons, we conclude that the "Other Modification Charge" is unreasonable and should be eliminated from this tariff.

SUBJECT: Cancellation of an Access Order

ECA TARIFF REFERENCE: Section 5.2.3(B)

TARIFF LANGUAGE:

"(B) Access Order costs are considered to have started when the Telephone Company incurs any cost in connection therewith or in preparation thereof which would not otherwise have been incurred. These costs include but are not limited to preliminary engineering, orders to suppliers and other similar items of cost. For purposes of determining Cancellation Charges, the costs are considered to have started on the order date (i.e., the day the Telephone Company gives a firm order confirmation to the IC)."

DISCUSSION: This provision establishes dates for when Access Order costs are considered to begin. In light of our discussion of proposed Section 5.2.3(C), *infra* at page 5-21, this provision is unnecessary and should be deleted from the tariff.

SUBJECT: Cancellation of an Access Order; Partial Cancellation Charge

ECA TARIFF REFERENCE: Sections 5.2.3(C) and 5.2.2(B)

TARIFF LANGUAGE:

Section 5.2.3(C): "When an IC cancels an Access Order for the installation of service, a Cancellation Charge will apply on a per order basis. The Cancellation Charge is calculated by multiplying the total of the nonrecurring charges associated with all items on the Access Order by the number of calendar days elapsed since the order date and dividing that figure by the number of days in the service interval (i.e., the number of days between the order date and the service date). The resulting amount is the Cancellation Charge. When determining the charge for a partial cancellation as set forth in 5.2.2(B) preceding, only those nonrecurring charges associated with the portion of the order being cancelled are used in computing the charge."

Section 5.2.2(B): "Any decrease in the number of ordered Special Access Service channels or Switched Access Service busy hour minutes of capacity will be treated as a partial cancellation.

An IC may cancel any number of Special Access Services. For Switched Access Service busy hour minutes of capacity, the amount cancelled cannot cause the order to drop below the minimum requirements as set forth in 5.1.1 preceding and 5.5 following. When the capacity cancelled brings the ordered capacity below these minimum requirements, the entire order will be cancelled.

A Cancellation Charge will apply on a per order, per occurrence basis for the quantity cancelled. The applicable Cancellation Charge is computed as set forth in 5.2.3 following."

ISSUES: A number of commenters challenge the lawfulness of the proposed Cancellation and Partial Cancellation Charges associated with Access Orders. (ICA, SBS, MCI, Allnet, WU, DJ, LC, ISACOMM, EMX, ASC and HTN.) They argue that these charges are substantial and wholly unrelated to the costs incurred by the telco when Access Orders are cancelled. According to the commenters, the costs of processing orders should not increase or decrease

in proportion to the quantity of service ordered by a customer until the service is actually installed. Thus, they question the cost-justification for a Cancellation Charge that is proportional to the installation interval and size of each order when the ordered facilities are provided from inventory. Moreover, say commenters, such charges will severely limit an IC's ability to compete and operate efficiently by responding to changes in technology and in the marketplace.

In their reply, the BOCs/CSO explain that Cancellation Charges are designed to recover costs incurred by the telco prior to the cancellation date. They say that as soon as a customer requests service, the telco begins to incur costs associated with administrative processing or, for Switched Access Services, certain initial or network design activities. Cancellation Charges are said to be "appropriately calculated" from the firm order date and to "reasonably reflect" the costs incurred by the telco.

DISCUSSION: Because of the controversy surrounding these provisions, their apparent lack of cost-justification and the short amount of time available to get this tariff in place, we have determined that the provisions related to cancelling applications for ENFIA (BSOC Tariff F.C.C. No. 8) should apply on an interim basis to cancellation and partial cancellation of Access Orders. In refiling this tariff to be effective on April 3, the ECA should substitute the following language for Section 5.2.3(C):

"(A) Installation of Switched or Special Access Service facilities is considered to have started when the Telephone Company incurs any cost in connection therewith or in preparation thereof which would not otherwise have been incurred.

(B) Where the customer cancels an Access Order prior to the start of installation of access facilities, no charges shall apply.

(C) Where installation of access facilities has been started prior to the cancellation, the charges specified in (1) or (2) following, *whichever is lower*, shall apply.

(1) A charge equal to the costs incurred in such installation, less estimated net salvage. Such charge is determined as detailed in (D) following.

(2) The charge for the minimum period of Switched or Special Access Service ordered by the customer.

(D) Charges applicable as specified in (C)(1) preceding include the nonrecoverable cost of equipment and material ordered, provided or used, plus the nonrecoverable cost of installation and removal including the costs of engineering, labor, supervision, transportation, rights-of-way and other associated costs."

The ECA may amend this provision at a later date and apply different Access Order cancellation charge procedures, so long as those procedures are justified. Moreover, the ECA should provide support for its policy in Section 5.2.2(B) that a decrease in ordered Access Service capacity is treated as a partial cancellation. On its face, this policy appears unreasonable. Therefore, it should be justified or eliminated from this tariff.

SUBJECT: Cancellation of an Access Order

ECA TARIFF REFERENCE: Section 5.2.3(E)

TARIFF LANGUAGE (new):

"(E) If the telephone company misses a service date by more than 30 days due to circumstances over which it has direct control (excluding, e.g., acts of God, governmental requirements, work stoppages and civil commotions), the IC may cancel the Access Order without incurring cancellation charges.

DISCUSSION: Because this proposed modification would be advantageous to the telcos' customers, it is unlikely that any parties would protest it. Therefore, we will allow this modification to be made in this filing.

SUBJECT: Selection of Planned Facilities for Access Orders

ECA TARIFF REFERENCE: Section 5.2.4(A)

TARIFF LANGUAGE:

"(A) When there are facilities in the activated state for its use under a Planned Facilities Order, or analog or digital high capacity services to a Hub in the Access Service state, an IC may request a specific channel or transmission path be used to provide the Switched or Special Access Service requested in an Access Order. The Telephone Company will make a reasonable effort to accommodate the IC request. If the Telephone Company determines that the request cannot be met with reasonable effort, and another facility is activated for the IC's use, the Telephone Company will specify the use of that facility and notify the IC accordingly."

ISSUES: AT&T states that for high capacity facilities, it is crucial that an IC have assignment control at the voice grade circuit level. According to AT&T, this is especially critical in digital central offices where it is necessary to establish paths of connectivity from the intercity network to the local serving area network through a common Digital Access and Cross Connect System frame (DACS). Lack of such control is said to impact the planning process, the provisioning process and the investment utilization level of the DACS equipment. Thus, argues AT&T, if the IC orders a high capacity facility, assignment control of the circuits within that facility should be the right of the IC.

DISCUSSION: While we are sympathetic to AT&T's concern about this provision, we conclude that cooperation among the telcos and ICs can resolve this matter. Accordingly, we do not find this provision to be unreasonable. However, the final sentence in this provision should be deleted because it implies a limitation on the IC's use of facilities which has not been justified by the telcos.

SUBJECT: Minimum Period (for Access Service)

ECA TARIFF REFERENCE: Section 5.2.5(A)

TARIFF LANGUAGE:

"(A) Except as set forth in (B), (C) and (D) following, the minimum period for which [Switched and Special] Access Service is provided and for which charges are applicable, is six months. For the application of minimum period charges for Switched Access Service Feature Groups B, C, D, and E, it is assumed that the last identical capacity placed in service is the first one discontinued."

ISSUES: The commenters contend that a six month minimum period is longer than currently required, unjustified, unreasonable and discriminatory. They say that a one month minimum should be used instead. (AT&T, LC, MCI, DJ, Allnet, the Networks, USTEL, ICA, EMX, ISACOMM and WU.) Some commenters also urge that the "last-in, first-out" provision is unreasonable. In their reply, the BOCs/CSO say that the commenters' request for a one month minimum period ignores the "fundamental instability of the telecommunications industry." Access facilities will not necessarily be reusable, they say, and shorter service intervals are likely to result in unnecessary "churn" and stranded investment. The BOCs/CSO do, however, agree to specify that a new six month minimum period will not be imposed

when a customer replaces FGA with FGD, to the extent that such replacement is in equivalent quantities.

DISCUSSION: We have a number of concerns about this provision. First, no justification is given for requiring a six month minimum provision and payment period for Switched and Special Access Service when the minimum period for which ENFIA are provided and for which charges are applicable is one month. (See BSOC Tariff F.C.C. No. 8.) Second, Section 5.2.5(A) creates the potential for double recovery by the telcos. For example, where a customer orders Switched Access Service and then terminates the service after three months, the customer would still be liable for three more months of minimum monthly charges. In the meantime, the telco could provide those terminated facilities to a second customer and assess that customer minimum monthly charges as well. Neither the tariff nor its support material explains how this result would be avoided, nor do they account for the additional revenue that would be generated by charging two customers for the same facilities.

The assignment of minimum period liabilities on a "last-in, first-out" basis is also unreasonable. It would have the effect of extending the six month minimum period indefinitely, because facilities in service for years would be subject to termination liabilities if canceled within six months of any new order. This would tend to impose added charges on emerging carriers who are likely to make frequent changes in their facilities. However, since FGC facilities will be provided on a BHMC basis, not as identifiable facilities, "last-in, first-out" may be the most practical method for tracking early termination of FGC installed capacity.

To prevent double recovery by the telcos, and in the absence of any showing that longer minimum periods are necessary to adequately recover costs, the minimum period for Special and Switched Access may be no longer than one month. "Last-in, first-out" may be used for FGC, but only in connection with the one month minimum payment period.

SUBJECT: Shared Use Facilities

ECA TARIFF REFERENCE: Section 5.2.7

TARIFF LANGUAGE:

"Shared Use (i.e., Switched and Special Access Services provided over the same analog or digital high capacity facilities) is allowable only for existing services and to fill out existing systems. Only Switched Access Service busy hour minutes of capacity may be added to fill out existing systems. When Switched or Special Access Services provided over a shared use facility are disconnected, only Switched Access Service busy hour minutes of capacity can be ordered by the IC to backfill the system."

ISSUES: Several commenters argue that this provision is unduly restrictive. (AT&T, Allnet and ICA.) They say that an IC may want to aggregate traffic for both Switched and Special Access Services and send that combined traffic over high capacity facilities from the IC's point of presence to a local telco's facility Hub location.

DISCUSSION: We agree that the above provision is unduly restrictive. There is no facilities-based reason why Switched Access circuits cannot be used to provide Special Access service, or vice-versa. In fact, since the telcos will continue to allow shared use of such facilities for existing services, there is no apparent rationale for denying shared use to their other customers. The telcos, through accurate accounting, should be able to keep track of the respective services using the same facilities. Moreover, this provision has competitive implications in that it allows sharing for existing services but not for new services. Thus, emerging ICs would not have the same flexibility as existing carriers. For these reasons, we conclude this provision is unreasonable and should be eliminated.

SUBJECT: Switched Access Service Minimum Capacity Requirements

ECA TARIFF REFERENCE: Section 5.5.4, 5.5.6

TARIFF LANGUAGE:

Section 5.5.4: "When an IC requests *high frequency* analog or digital Interface Groups, the IC is required to order at a minimum, sufficient capacity to utilize 70% of the channels."

Section 5.5.6 sets out a table which gives the total capacity and minimum order requirements for various "high frequency" interface groups.

ISSUES: Allnet and EMX complain that the 70% fill factor is not adequately justified.

DISCUSSION: Use of the 70% fill factor has not been, and must be, justified by the ECA. In addition, this provision uses the term "high frequency" facilities, which is not defined elsewhere in the tariff. Because of the ambiguity of this provision and the lack of support for the capacity requirement, it should either be deleted or justified and revised to correct these problems.

SUBJECT: Switched Access Service Minimum Capacity Requirements

ECA TARIFF REFERENCE: Section 5.5.5

TARIFF LANGUAGE:

"For the purpose of administering the minimum capacity provisions, Access Orders for Access Connection Interface Groups for Different Feature Groups may be grouped together if the facilities provided for all the connections are the same and terminate in the same facilities terminal in the same end office."

DISCUSSION: The BOCs/CSO proposed the following modification of Section 5.5.5.

"For the purposes of administering the minimum capacity provisions, Access Orders for Access Connection Interface Groups for Different Feature Groups may be grouped together if the facilities provided for all the connections are the same and terminate in the same facilities terminal in the same *Telephone Company access tandem or end office.*"

This modification would give the customer greater flexibility in meeting the telcos' minimum capacity requirements. Accordingly, we will allow this modification to be made.

SUBJECT: Record Modification and Charges

ECA TARIFF REFERENCE: Section 5.6

TARIFF LANGUAGE: (paraphrased):

This provision allows for certain record modifications to be made (e.g. billing name or address) and cross-references other provisions to determine the amount of the applicable charges.

ISSUES: SBS says that in light of the enormous number of changes that will be occurring to Access Service records, the tariffs must accommodate the numerous errors and disputes that will arise.

DISCUSSION: We have the same concerns about Record Modification Charges that we have about Other Modification Charges. The activities associated with this charge are typically part of a telco's normal overhead in administering a service. For the reasons discussed *supra* at page 5-19, this provision should be eliminated.

Section 6. Switched Access Service

Switched Access Service provides for the use of telco facilities to establish connections between ICs and their customers. It will typically be used by ICs at the originating and terminating ends of MTS, WATS, and the MTS/WATS-type interexchange services.[1]

The Commission's Rules contemplate that access charges will be collected from either ICs or end users. *See* 47 C.F.R. § 69.5. Carriers' carrier charges (i.e. charges payable by ICs to telcos) were to encompass nine elements: Limited Pay Telephone, Carrier Common Line, Line Termination, Local Switching, Intercept, Information, Common Transport, Dedicated Transport, and Special Access. 47 C.F.R. § 69.4(b).

Under the ECA Tariff seven of these elements are imposed on ICs who order Switched Access Service. The ECA divides these elements into three rate categories, as follows: Carrier Common Line (provided under Section 3 of the ECA Tariff); End Office (including the line termination, local switching, intercept and information elements); and Local Transport (which combines the Common Transport and Dedicated Transport elements). A fourth rate category not specifically mandated by our Rules is also imposed on ICs under the ECA tariff structure. This additional category, Access Connections, is essentially an installation charge. *See supra* discussion of nonrecurring charges in main text.

As filed, the ECA tariff rate structure for Switched Access Service consists of traffic sensitive recurring and nonrecurring charges. For example, the tariff requires ICs to order Access Connections, Local Transport, and End Office functions according to the IC's projected need for Busy Hour Minutes of Capacity. For each BHMC, a non-recurring charge of $10.00 applies. *See infra* discussion of § 6.8.1. ICs are also required to pay for Switched Access according to the number of access minutes actually used.[2] In addition to these charges, several monthly rates, minimum charges, service rearrangement charges and individual case basis (ICB) charges apply to ICs ordering certain types of features under Switched Access Service.

A number of commenters have argued that the basic structure of Switched Access Service operates to create discriminatory preferences for AT&T as against other ICs who must order Switched Access under different "Feature Groups".[3] These claims primarily relate to the ECA's

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[1] Use of the term "IC" should be clarified so as to conform with our discussion of Section 2.6, *supra*.

[2] In the case of Local Transport, charges are also calculated according to distance.

[3] As filed, the ECA tariff offers Switched Access Service in five Feature Group arrangements differentiated by the type of access connection provided (line side or trunk side) and by the access calling pattern (i.e. the number and sequence of digits that must be dialed to access the IC's services). For example, under Feature Group A (FGA), ICs

proposed rate structure (e.g. imposition of charges for "optional" features not needed by AT&T, charges for changes and upgrading of service, etc.). It has also been suggested that the arrangement of services under the various Feature Groups is discriminatory with respect to access quality (i.e. technical performance guarantees).

Many provisions within Section 6 appear to grant too much discretion to the telco in matters critical to the IC's provision of services. For example, technical performance standards, availability of optional features, and applicability of certain rates and charges may vary between Feature Groups depending on routing and other factors that are to be determined solely at the discretion of the telco. Moreover, some options and features are made available only with the "agreement" of the telco. The tariff, however, contains few standards that govern the exercise of the telco's discretion in these important matters.

In addition, there are many provisions within Section 6 that appear to impose unreasonable burdens upon ICs. For example, the tariff contains provisions that require ICs to submit extensive reports on traffic, provisions that make use of assumed access minutes, minimum ordering requirements and other minimum charges that may pose financial problems for all ICs, particularly smaller carriers. In these cases, we have required the ECA to provide more complete justification for the charges assessed, or, where appropriate, we have required that the language of the tariff be clarified.

Many of the issues raised by commenters with respect to Switched Access Service would appear to have been resolved by the Commission's *Second Reconsideration* decision. For example, until equal access becomes available, Feature Groups A and B access service provided to ICs other than AT&T (i.e. OCCs) will be ordered, and charges assessed, on a per line basis rather than on a traffic sensitive basis. Thus, to the extent that claims of discrimination have been based on the application of traffic

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would obtain line side access to the telco's facilities. The IC's customers may then connect to the IC by dialing a seven digit exchange telephone number. Feature Group B provides the IC with trunk side access connections, and is accessible through a uniform 950-10XX access code.

Feature Group C is limited to ICs that are traditional providers of MTS and WATS (i.e. AT&T). From a technical standpoint, FGC access is essentially identical to access arrangements currently provided to AT&T. In obtaining FGC access, however, AT&T would be subject to a number of tariffed charges, rates and regulations similar to those applied to ICs ordering under other Feature Groups.

Feature Group D is intended to replace Feature Group C, as equal access is made available to ICs. It consists of trunk side access, characterized by a uniform 10XX access code.

Finally, Feature Group E is a service offered to Radio Common Carriers. Under the *Second Reconsideration*, however, this offering will be deleted from access service tariffs.

sensitive rate structures to Feature Groups A and B, these concerns should be alleviated for the immediate future. We shall continue to investigate these issues, however, insofar as they apply to equal access service made available in the future.

SUBJECT: Switched Access Service—General

ECA TARIFF REFERENCE: Section 6.1

TARIFF LANGUAGE:

"Switched Access Service provides a two-point electrical communications path between the IC terminal location and telephone exchange service locations. Each path is capable of the transmission of voice and associated telephone signals within the frequency bandwidth of approximately 300 to 3000 Hz.

Switched Access Service provides for the use of common terminating, switching and trunking facilities, and jointly used subscriber plant of the Telephone Company's public switched network by ICs for their use in furnishing their services. Directory listings are not included with Switched Access. These are provided from the Telephone Company's local and/or general exchange service tariff.

Switched Access Service is provided in various Feature Group arrangements which are differentiated by the type of connection (i.e., line side connection and trunk side connection) and the access calling pattern (e.g., 950-10XX calling in a LATA, 10XX calling in a LATA, etc.).

Switched Access Service provides for the ability to make and receive calls to and from telephone exchange service locations in the LATA associated with the specific Feature Group provided.

At the option of the IC, Switched Access Service may be provided for both interstate and intrastate communications. When the IC orders such mixed access, it is responsible for providing the reports in 2.3.14 preceding to the Telephone Company.

When the IC plans to use Switched Access Service in connection with the resale of services of another IC, such Switched Access Service will be provided subject to the rate regulations set forth in 6.7.3 following. Such Switched Access Service will be provided as set forth in the following paragraphs of this section. The IC shall order the features and options it desires in accordance with the provisions of this section."

DISCUSSION: This section provides only a fragmentary description of Switched Access Service, and as such, does little to explain or clarify the extremely complex tariff structure that follows. It makes little sense, for example, to state that each signal path has a frequency bandwidth of approximately 300 to 3000 Hz, when specific provisions within Section 6 elaborate considerably on the technical characteristics of Switched Access Service. The same problem occurs with respect to references to whether Directory listings are included, references to mixed interstate and intrastate usage, and references to resale of services of another IC. These uses of Switched Access Service are covered within the main provisions of Section 6, and to partially repeat regulations here is to invite confusion and possible conflict in applicable rules.

This section should be revised so as to eliminate fragmentary repetitions or paraphrases of rules and regulations found within Section 6. Instead, the provision should explain, in a general fashion, the Switched Access Service offering. This introduction should discuss the manner in which ICs and customers may obtain Switched Access, and the types of charges that are to apply for each type of access. The provision should, in each case, provide

references to the actual sections that would apply for each type of access described.*

SUBJECT: Switched Access Service—Dedicated Access Line Service

ECA TARIFF REFERENCE: Section 6.1.2, *See also* §§ 3.2(E); 3.3(C), (D); 3.4(F); 3.7(D); 6.1.3; 6.1.3(C)(2); 6.3.1.(T)-(X); 6.7.3; 6.8.3

TARIFF LANGUAGE:

"Dedicated Access Line Service is a type of Special Access Service that is provided only for use with Feature Group C and D Switched Access Service. Dedicated Access Line Service connects an end user premises with a WATS or WATS type serving office. This service is described in 7.2.1(F) following."

DISCUSSION: Treatment of closed end WATS access has been extensively discussed in the *Second Reconsideration Order.* This provision, as well as others that refer to Dedicated Access Line Service, should be revised or deleted in accordance with that *Order.*

SUBJECT: Switched Access Service—Rate Categories—Access Connections

ECA TARIFF REFERENCE: Section 6.1.3(A). *See also* §§ 6.1.3(A)(12), 6.1.3(C).

TARIFF LANGUAGE:

"(A) The Access Connections rate category provides for the busy hour minutes of capacity and interface arrangements established for the IC. Such Access Connections are provided at rates and charges as set forth in 6.8.1 following.

* * * * *

Access Connections are provided in ten separate Interface Groups. Each Interface group provides a specified facility interface (e.g., two-wire, four-wire, DS1, etc.) . . . Provision of the Interface Groups and any optional features may require placement of Telephone Company equipment on the IC's premises."

DISCUSSION: This provision is unnecessarily vague with respect to the possible placement of equipment on IC premises, and should include some indication of what conditions would require such placement, and the general type of equipment that would be involved. *See supra* discussion of § 2.1.5. In addition, the reference to busy hour minutes of capacity for access connection must be revised to comply with the discussion of nonrecurring charges in the main text of this *Order. See supra* main text.

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* For example, the last two paragraphs of Section 6.1 are at least somewhat helpful in describing two types of access offered and the responsibilities involved with each. Both paragraphs are incomplete, however, in that neither one fully references the rates and regulations that would be applicable to each type of access. *Cf.* § 3.3 (provision explaining substantially all applications of Carrier Common Line charges). Moreover, the paragraph dealing with "the ability to make and receive calls to and from telephone exchange service locations in the LATA associated with the specific Feature Group provided" is entirely insufficient. Even after careful study of the tariff, we are unable to say with complete certainty what charges will apply for this most basic of Switched Access Service offerings. The explanation in Section 6.1 should be expanded to include cross-references to all rates and regulations that would apply when Switched Access Service is used in this manner. In particular, the charges and credits, if any, for intrastate toll usage within a LATA should be explained fully. *See infra* discussion of § 6.7.11.

SUBJECT: Switched Access Service—Access Connection—Interface Group Nonchargeable Optional Features—Supervisory Signaling

ECA TARIFF REFERENCE: Section 6.1.3(A)(12)(a)

TARIFF LANGUAGE!fo:

The provision sets forth signaling arrangements available for various interface groups. These arrangements are said to be available at the option of the IC, but only "with the agreement of the Telephone Company."

DISCUSSION: This feature is described as a nonchargeable "option." However, from the text of this provision it appears that the Supervisory Signaling feature is available only within the discretion of the telco. The circumstance under which this option will be unavailable must be specified in the tariff.

SUBJECT: Switched Access Service—Rate Categories—Local Transport—Choice of Routing

ECA TARIFF REFERENCE: Section 6.1.3(B); *See also* §§ 6.5.2; 6.5.5

TARIFF LANGUAGE:

"The Telephone Company will determine whether the Switched Access Service is to be routed directly to an end office switch or through an access tandem switch unless the IC orders the provision of other than Telephone Company Selected Traffic Routing optional feature."

ISSUES: Commenters contend that this provision is discriminatory because the choice of local transport routing determines the transmission performance offered to ICs. *See* §§ 6.2.1(C), 6.2.2(C), 6.2.3(C), 6.2.4(C), and 6.2.5(C). Selection of routing also governs the availability of certain features. *See, e.g.*, §§ 6.3.1(F) (Automatic Number Identification), 6.3.2(A) (Rotary Dial Station Signaling), 6.3.2(B) (Operator Trunk). ICs who obtain direct trunk routing initially will therefore obtain the higher quality transmission performance contingent on such routing. Other ICs wishing to obtain routing with higher performance or with greater option availabilities must order the "Provision of Other Than Telephone Company Selected Traffic Routing" under § 6.1.3(B)(1)(a). This option results in charges to the IC, to be determined on an individual case basis. *See* § 6.8.2(B). MCI argues that, because the rates for local transport are based on airline mileage and because ICs must pay a minimum monthly usage charge under Section 6.7.4, this problem may be solved by requiring the telco to provide direct routing at no extra charge wherever the IC requests such routing.

DISCUSSION: We agree that the application of additional ICB nonrecurring and recurring charges for the "optional" features set forth in Section 6.1.3 would result in unjust discrimination between ICs. For example, under Section 6.1.3(B)(1), where one IC is provided with direct routing, other ICs not initially provided with direct routing must pay additional charges to obtain identical facilities. The ECA provides no justification for this disparate treatment and without such justification, these charges should be deleted. We are unwilling, however, to adopt MCI's proposal that ICs should be able to obtain particular routing or other optional features on demand. Instead, the tariff should provide that the telco will work cooperatively with ICs to develop routing and other local transport arrangements. *See infra* discussion of § 6.5.2.

SUBJECT: Switched Access Service—Local Transport

ECA TARIFF REFERENCE: Section 6.1.3(B). *See also* § 6.1.3(C)

TARIFF LANGUAGE:

"(B) Local Transport is provided at the rates and charges as set forth in 6.8.2(A) following. Rates are applied on an access minutes basis. When Feature Groups A or E terminate in Telephone Company end offices that are not equipped for measurement capabilities, a Telephone Company assumed average number of access minutes will be billed to the IC in lieu of actual usage. These rates will be billed in terms of the total number of access minutes (i.e., originating and terminating). For terminating Feature Group B Switched Access Service where no measurement capabilities exist in the Telephone Company designated electronic Access Tandem switch, a Telephone Company assumed average number of access minutes will be billed to the IC in lieu of actual usage."

DISCUSSION: In light of the Commission's decision on *Second Reconsideration* to apply a flat per-line charge to OCCs, it would appear that questions associated with application of assumed access minutes to ICs using FGA or FGB Switched Access Services need not be addressed at this time. Accordingly, these provisions are unnecessary and should be deleted.

SUBJECT: Switched Access Service—Design Layout Report

ECA TARIFF REFERENCE: Section 6.1.5

TARIFF LANGUAGE:

"The Telephone Company will provide to the IC the makeup of the facilities and services provided to the first point of switching. This information will be provided in the form of a Design Layout Report. The Design Layout Report will be provided to the IC at no charge."

DISCUSSION: This provision requires the telco to provide information on the makeup of facilities and services provided to the IC. It is not clear, however, whether these reports will be reissued or updated as the facilities and services provided to the IC change. The tariff should provide that the Design Layout Report will be reissued or updated whenever facilities provided to the IC are materially changed.

SUBJECT: Switched Access Service—Acceptance Testing

ECA TARIFF REFERENCE: Section 6.1.6

TARIFF LANGUAGE:

"At no additional charge, the Telephone Company will, at the IC's request, cooperatively test, at the time of installation, [various technical] parameters . . . . If acceptance tests are not started within 30 minutes after the scheduled appointment time for such tests, as negotiated between the Telephone Company and the IC, additional charges will apply, as set forth in 13.2.6(B) following."

DISCUSSION: The ECA has provided no justification for the assessment of this charge on ICs. It is not at all clear, for example, what costs (if any) the telco incurs as a result of IC failure to begin acceptance testing. If, for example, the telco engineering personnel assigned to conduct acceptance tests are not required to visit IC premises during the tests, it appears unlikely that delays of any duration would result in specifically attributable costs to the telco. Presumably, if the IC fails to begin testing within 30 minutes, engineering personnel could engage in other activities. Assessment of stand-by engineering charges in these circumstances would be clearly unreasonable.

Assuming that there are, in fact, some specific costs that result when an IC misses an acceptance testing appointment, it may be reasonable to assess a fixed charge based solely on these costs. As filed, however, the provision is ambiguous with respect to both the time that

additional timed charges would begin to apply and the time that additional charges would cease to accrue. For example, if more than 30 minutes of cooperative preparation is necessary before actual acceptance testing begins, the provision would appear to apply charges because testing has not "started." On the other hand, in cases where the IC is unable to begin tests for a day or even a weekend, a literal application of the provision would result in charges totalling hundreds of dollars or more, as there is no limitation on the amount of stand-by time chargeable to the IC after the initial 30 minutes has passed.

Responding to objections by commenters, the BOCs/CSO have proposed to modify this provision by the addition of language that would absolve the IC of liability for the charge if the delay is caused by the telco. Assuming that this charge can be justified at all, any provision submitted to replace Section 6.1.6 should incorporate this proposed revision.

SUBJECT: Switched Access Service—Feature Group A

ECA TARIFF REFERENCE: Section 6.2.1

TARIFF LANGUAGE:

The provision describes access service provided to ICs under Feature Group A.

ISSUES: Feature Group A consists of essentially the same facilities that are provided to local business subscribers under telco general and/or local exchange tariffs. MCI contends that, because these facilities are identical, the rates payable under access tariffs for FGA should be equivalent to those paid by local business subscribers.

DISCUSSION: This argument was considered—and rejected—by the Commission during the course of the access charge proceeding. *See Second Reconsideration Order*. It will not be reconsidered here.

SUBJECT: Switched Access Service—Feature Group A—Assignment of Seven Digit Telephone Number

ECA TARIFF REFERENCE: Section 6.2.1(A)(4)

TARIFF LANGUAGE:

"(A)(4) A seven digit local telephone number assigned by the Telephone Company is provided for access to FGA switching in the originating direction. The seven digit local telephone number will be associated with the selected end office switch and is of the form NXX-XXXX."

ISSUES: The ECA has proposed to modify this section by adding the following language:

"If the IC requests a specific seven digit telephone number that is not currently assigned, and the Telephone Company can, with reasonable effort, comply with that request, the requested number will be assigned to the IC."

DISCUSSION: The proposed addition appears not unreasonable. We will therefore allow this modification to be made.

SUBJECT: Switched Access Service—Description of Feature Groups A, B, C, D and E

ECA TARIFF REFERENCE: Sections 6.2.1(A)(7), 6.2.2(A)(5), 6.2.3(A)(5); 6.2.4(A)(4); 6.2.5(A)(4)

TARIFF LANGUAGE:

These provisions set forth the types of calls that can be made when Feature Groups A, B, C, D and E are used in the terminating direction. Each provides that, for calls to services of other IC's, "additional charges may apply."

DISCUSSION: The provisions are ambiguous and vague because the circumstances under which additional charges may apply, as well as the amounts of these charges, are unspecified. The provisions should explain the applicability of these charges; alternatively, the provisions should be edited so as to delete references to unexplained additional charges.

SUBJECT: Switched Access Service—Feature Group D—Use of Access Codes

ECA TARIFF REFERENCE: Section 6.2.4(A)(6)

TARIFF LANGUAGE:

"The access code for FGD switching is a uniform access code of the form 10XX. A single access code will be the assigned number of all FGD access provided to the IC by the Telephone Company. No access code is required for calls to an IC over FGD Switched Access Service if the customer's telephone exchange service is arranged for presubscription to that IC, as set forth in 13. following. For a limited period of time, no access code is required for calls to a provider of MTS and WATS, when such calls are placed from a Telephone Company public or semipublic telephone."

DISCUSSION: It is unclear why it would be necessary to maintain access code-free calling for MTS and WATS providers under Feature Group D when those calls are placed from telco public or semi-public telephones. The supporting materials filed with the ECA tariff contain no justification for this practice. Clearly, the continuation of access code-free dialing to providers of MTS and WATS, even in the limited circumstances of public and semi-public telephone dialing, constitutes a preference with some competitive consequences. The provision should be justified or deleted.

Assuming that such justification is possible, it would remain for the ECA to clarify the meaning of a "limited period of time." Some indication must be given in the tariff that would enable the Commission to determine whether the time period required to end this preference is reasonable.

SUBJECT: Switched Access Service—Feature Group E

ECA TARIFF REFERENCE: Section 6.2.5

TARIFF LANGUAGE:

The provision describes in detail the Feature Group E offering to Radio Common Carriers (RCCs).

ISSUES: Many RCCs contend that switched access charges should not apply to their operations because the RCC's network is more closely analogous to that of the exchange carrier, and is not an IC operation. (BC, MCC, MCCA, MCIA, Telocator).

DISCUSSION: The applicability of access charges to RCCs was extensively considered in the Commission's *Second Reconsideration* decision. There, it was determined that RCCs should not be treated as interexchange carriers under the access charge rules. Accordingly, provisions relating to the Feature Group E offering should be deleted.

SUBJECT: Switched Access Service—Common Switching Optional Features—International Carrier Option

ECA TARIFF REFERENCE: Section 6.3.1(R)

TARIFF LANGUAGE:

"This option allows for Feature Group D end offices or access tandem switches equipped for International Direct Distance Dialing to be arranged to forward the international calls of one or more international carriers to the IC. This arrangement requires provision of written verification to the Telephone Company that the IC is authorized to forward such calls. This option is only provided at Telephone Company end offices or access tandems equipped for International Direct Distance Dialing. It is available with Feature Group D."

DISCUSSION: This provision apparently requires ICs to submit written verification of their authority to handle international calls for other ICs. It is impossible, however, to determine from the language of the provision whether this is the case, or whether some other authorization is at issue. Moreover, it is not clear why the telco should require such authorization. The tariff should explain the situations in which authorization is necessary. In addition, the ECA should justify the need for evidence of such authority.

SUBJECT: Switched Access Service—Common Switching and Transport Nonchargeable Optional Features—Features Associated with Dedicated Access Line Service

ECA TARIFF REFERENCE: Section 6.3.1 (T) - (X)

TARIFF LANGUAGE:

These provisions describe options available with Dedicated Access Line Service (DALS), including Band Advance Arrangment, End Office Customer Line Service Screening, Hunt Group Arrangment, Uniform Call Distribution Arrangement and Nonhunting Number Arrangement.

DISCUSSION: In light of the *First Reconsideration Order's* elimination of the Dedicated Access Line category, the references to DALS should be deleted. *See supra* discussion of § 6.1.2.

SUBJECT: Switched Access Service—Transmission Performance Capabilities

ECA TARIFF REFERENCE: Section 6.4

TARIFF LANGUAGE:

"Each Switched Access Service transmission path is provided with a standard transmission performance. There are three different standard performances (Types A, B and C). The standard for a particular transmission path is dependent on the Interface Group and whether the service is directly routed or via an access tandem. The available transmission performances are set forth in 6.4.1 following. Data Transmission Parameters are also provided with each Switched Access Service transmission path. The Telephone Company will, upon receipt of a trouble report from the IC, conduct tests, either independently or cooperatively with the IC as appropriate, and take any necessary action to insure that the parameters set forth in 6.4.2(A) or 6.4.2(B) following are met. The testing will be charged for at the rates set forth in 13.3.5(C)(1)(e) following for Nonscheduled Testing.

The Telephone Company will maintain existing transmission performance on service configuration installed prior to January 1, 1984. All service configurations installed after January 1, 1984 will conform to the transmission performance standards contained in this tariff, except as follows. Where local facility conditions cannot support the transmission performance standards contained in this tariff, transmission standards that can be supported will be uniformly applied to all ICs."

ISSUES: Commenters contend that the provision is vague and potentially discriminatory. Because the telco may undertake testing "independently," it appears to have almost unlimited discretion in imposing charges on ICs who file trouble reports. Also, the tariff does not specify whether the charges will apply if the circuit fails testing. Moreover, the grandfathering of transmission performance for service configurations installed prior to January 1, 1984 may discriminate in favor of established ICs. Finally, the provision is vague with respect to the conditions that will allow lower transmission standards than those set forth in the tariff. (AT&T, ITT, LC, MCI).

DISCUSSION: This provision sets forth a large number of technical performance standards. To a great extent, these provisions have no counterpart in prior tariff arrangements, and it is therefore difficult to determine whether these standards are reasonable, or even the extent to which these standards differ from previously applied technical parameters. While the BOCs/CSO claim that, in most cases, the standards set forth in Section 6.4 are essentially equal to or more stringent than the parameters developed in connection with Docket 20099, *Facilities for Other Common Carriers*, 52 FCC 2d 752 (1975), it remains unclear whether this is in fact the case, or whether the tariff adequately implements those standards.

The complexity of the technical issues presented by this provision and similar technical performance standards contained in the tariff makes detailed review within this *Order* impossible. We intend, however, to carefully examine the level of technical performance provided to ICs under the access tariffs, and, as the need arises, to institute special proceedings to examine questions related to access quality. Several aspects of Section 6.4, however, are in need of immediate explanation and justification or revision. In particular, the ECA has failed to justify the need to provide "grandfathered" transmission performance standards to those carriers with access arrangements in place prior to January 1, 1984. This provision should be explained and justified or deleted. Moreover, the circumstances under which the telco will conduct testing "independently" should be explained and justified, particularly in cases where this independent testing results in charges to ICs. The ECA should also explain and justify or delete the numerous exceptions set forth within Section 6.4 that relate to "local facility conditions" or "facility network conditions." This language effectively renders tariffed performance standards meaningless, because it appears that the standards are to apply only in some cases. Within the context of a tariff, these unlimited exceptions are far too vague and ambiguous, and should be limited or removed entirely. Also, the provision should make clear that charges are not to be applied in cases where the circuit fails testing.

Finally, the provision should cross reference standard engineering manuals used by telcos to determine maintenance and acceptance limits for technical performance levels.

SUBJECT: Switched Access Service—Obligations of the Telephone Company—Network Management

ECA TARIFF REFERENCE: Section 6.5.1

TARIFF LANGUAGE:

"The Telephone Company will administer its network to insure the provision of acceptable service levels to all telecommunications users of the Telephone Company's network services. The Telephone Company maintains the right to apply protective controls on any traffic that it carriers over its network, including an IC's Switched Access Service, in order to prevent unsatisfactory performance to other users."

DISCUSSION: The provision is vague and ambiguous, and gives the telco too much discretion. While it does not appear unreasonable for the exchange carrier to reserve the right

to manage its network, this provision appears overly broad and vague. The terms "acceptable service levels," "protective controls" and "unsatisfactory performance" should be defined. Also, the tariff should make clear that, in cases where the telco applies protective controls in a manner that reduces the quantity of service provided to an IC, outage credits will be applied to the ICs account.

SUBJECT: Switched Access Service—Obligations of the Telephone Company—Design and Traffic Routing of Switched Access Service

ECA TARIFF REFERENCE: Section 6.5.2. *See also* §§ 6.1.3(B), 6.5.5

TARIFF LANGUAGE:

"The Telephone Company shall design and determine the routing of Switched Access Service, including the selection of the first point of switching and the selection of facilities from the interface to any switching point and to the end offices where busy hour minutes of capacity are ordered unless the IC orders the optional feature Provision of Other than Telephone Company Selected Traffic Routing. The Telephone Company shall also decide if capacity is to be provided by originating only, terminating only, or two way trunk groups unless the IC orders the optional feature IC Specification of Feature Group Directionality. Finally, the Telephone Company will decide whether trunk side access will be provided through the use of two-wire or four wire trunk terminating equipment. However, for Feature Group B the IC may order the optional feature IC Specification of Local Transport Termination. Selection of facilities and equipment and traffic routing of the service are based on standard engineering methods, available facilities and equipment and the Telephone Company traffic routing plans."

DISCUSSION: Under various provisions in Section 6 of the ECA tariff, the transmission performance level guaranteed to ICs, the availability of certain options, and the application of additional charges is dependent on the choice of routing made by the telco. For example, ICs initially provided with direct trunk routing will obtain higher quality transmission performance under Section 6.2.3(C), and will be able to obtain various options available only to carriers obtaining direct trunking. *See, e.g.*, §§ 6.3.1(F) (Automatic Number Identification) 6.3.2(A) (Rotary Dial Station Signaling), 6.3.2(B) (Operator Trunk). ICs that are not provided such routing options may request direct trunk routing under Section 6.1.3(B)(1)(a), but under the tariff as proposed, this would involve an additional charge. We have already found that the application of additional charges under Section 6.1.3(B) is unjustified. *See supra* discussion of § 6.1.3(B). It remains, however, to decide on a method whereby ICs may obtain desired routing without imposing unwarranted burdens on the telco. We believe that the authority reserved to telcos under Section 6.5.1, as limited by the imposition of standard engineering performance limits, *see supra* discussion of § 6.4, should be sufficient to resolve most disputes that arise between ICs and telcos as regards selection of routing and first points of switching. To reinforce this, however, the provision should include a statement to the effect that the telco will work cooperatively with ICs in providing requested design and traffic routing of Switched Access Service.

SUBJECT: Switched Access Service— Obligations of the Telephone Company—Provision of Service Performance Data.

ECA TARIFF REFERENCE: Section 6.5.3

TARIFF LANGUAGE:

"With the agreement of the Telephone Company, service performance data for an IC's Switched Access Service may be made available to the IC, based on previously arranged intervals and format. These data may include, but are not limited to, IC equipment blockage, failure results and transmission performance. If the data are to be provided through a mechanized exchange of data, the cost of such exchange will be determined on an individual case basis and must be borne by the IC. Provision of the data in paper format will be at no charge."

DISCUSSION: The provision should be clarified with respect to the availability of service performance data. Clearly, if the IC receives testing services under this and other sections of the tariff, it should receive some record of test results and other performance data - there should be no need of telephone company "agreement" in order to receive service performance data. In addition, the tariff should specify what data will be provided with these reports.

Moreover, it is unclear what would constitute a "mechanized exchange" of data. The ECA should explain this reference, or specify that, if data are to be provided *in other than paper format*, the cost of such exchange will be determined on an individual case basis.

SUBJECT: Switched Access Service—Obligations of the Telephone Company—Trunk Group Measurement Reports

ECA TARIFF REFERENCE: Section 6.5.4

TARIFF LANGUAGE:

"With the agreement of the Telephone Company, trunk group data in the form of usage in CCS, peg count and overflow, where technologically feasible, will be made available to the IC based on previously agreed to intervals."

DISCUSSION: The tariff makes available trunk group measurement reports, but only at the agreement of the telco and where technologically feasible. It is unclear what circumstances would be required to obtain this agreement, or where this data would not be technologically feasible to supply. The provision should be clarified with respect to the availability of this service performance data. In particular, the phrase "with the agreement of the Telephone Company" should be deleted. The tariff may specify, however, that the data is to be obtainable by ICs, subject to availability.

SUBJECT: Switched Access Service — Obligations of the Telephone Company — Design Blocking Probability

ECA TARIFF REFERENCE: Section 6.5.7

TARIFF LANGUAGE:

The provision sets forth the performance standards that the exchange carrier will meet with respect to blocking probability. The provision "grandfathers" existing configurations, and notes that where the design standard cannot be met due to local facility conditions, some other standard will be maintained on a uniform basis to all ICs.

ISSUES: Commenters suggest that the provision is vague and has the potential to allow discrimination between carriers. In particular, the "grandfathering" of performance standards for existing service configurations is said to create unjustified preferences for existing carriers as against new carriers. Also, the tariff does not specify what local facility conditions will require the abandonment of the tariff standards, or how those lower standards will be determined. The provision appears to overlap Section 6.5.5 (Determination of number of Transmission Paths). Arguably, this overlap makes one or the other provision redundant.

Finally, AT&T suggests that the provision specifies design blocking objectives in an inflexible manner. AT&T claims that ICs should be allowed to choose blocking objectives from a range of blocking rates, depending on demand.

DISCUSSION: This provision should be explained and justified by the ECA. It is unclear why blocking standards should be "grandfathered" for ICs with access arrangements in effect prior to January 1, 1984. Language to the effect that standards will be maintained, except where local facility conditions do not permit such maintenance, should be explained or deleted. *See supra* discussion of § 6.4. Finally, while it appears that AT&T's suggestion relating to "flexible" design blocking probability may have positive economic benefits, we will not require that carriers implement such a system at this time. Aside from problems of complexity, we are not certain that telcos can arrange their networks at this time in such a manner as to provide ICs with varying design blocking probabilities.

SUBJECT: Switched Access Service — Obligations of the IC — Report Requirements

ECA TARIFF REFERENCE: Section 6.6.1

TARIFF LANGUAGE:

"ICs are responsible for providing the following reports to the Telephone Company, when applicable.

(A) *Jurisdictional Reports* When an IC orders Switched Access Service for both interstate and intrastate use, the IC is responsible for providing reports as set forth in 2.3.14 preceding . . . .

(B) *LATA Default Percent Interstate Use (PIU) Report*

When an IC orders Switched Access to any end office in a LATA, it must provide a projected percentage of interstate use that will serve as a default PIU for the entire LATA. This figure will be used to apportion charges for usage measured at end offices to which the IC has not ordered capacity."

DISCUSSION: Because we have modified the Jurisdictional Report requirement, *see supra* discussion of § 2.3.14, these provisions should be revised to conform with our discussion of that Section.

SUBJECT: Switched Access Service for Resale of Other IC Services

ECA TARIFF REFERENCE: Section 6.7.3

TARIFF LANGUAGE:

The provision sets forth the procedures that apply when the IC is planning to use switched access "in association with" the resale of WATS. Numerous reporting requirements are imposed on ICs under this provision. For example, the IC must report the number of resold WATS lines with 2500 or more originating access minutes; the IC terminal location where closed end WATS lines are terminated; and where both line side and trunk side Switched Access Service are used in combined access arrangements, the number of resold WATS lines to be associated with each. Where this "split" is not reported, the tariff states that the telco will assume that all resold WATS lines in the combined access arrangement are to be associated with line side switched access connections.

The IC must submit these reports within 15 days of the billing date shown on the WATS service bill in order to receive proration treatment in the current billing cycle. If no reports are received during the monthly period after the initial period, proration will not apply. These

reports are to be submitted monthly, unless the telco notifies that IC that it has "sufficient information to substantiate the rate treatment set forth in (D) following."

The "rate treatment" available to ICs submitting these reports is as follows:

(1) For line side Switched Access Service (i.e., FGA) in a combined access arrangement, the LATA access minutes used to determine Local Transport, Local Switching (LS1), Line Termination and Intercept charges will be reduced by 2500 access minutes for each resold WATS line reported by the IC as having at least 2500 originating minutes collected. However, the total number of access minute credits shall not reduce the access minute billing to less than zero.

(2) For each resold WATS line used to reduce the line side switched access minutes, a local business line rate will apply. However, the number of local business line rates applied in a LATA shall not exceed the number of Switched Access Services provided to the IC (for this purpose, a Switched Access Service equals the total number of busy hour minutes of capacity divided by 30).

Finally, Subsection (E) of Section 6.7.3 sets forth substantial report verification and auditing rights granted to the exchange carrier upon the ICs notification that Switched Access Service is to be used in a combined access arrangement.

ISSUES: Commenters contend that this provision imposes unreasonable reporting requirements upon ICs, and results in the unlawful application of Local Transport, Local Switching, Line Termination and Intercept charges upon resold WATS usage. (MCI, ICA, ITT, SBS).

DISCUSSION: According to the ECA, Section 6.7.3 and related provisions (*e.g.* §§ 3.3(C), 3.4(C), 3.7(D)) are intended to apply a proration formula similar to the billing arrangement formerly used by carriers who supplied combined access arrangements under ENFIA. *See* Bell System Operating Companies Tariff F.C.C. No. 11. A "combined access" arrangement was provided where an IC obtained both ENFIA access and WATS access, and commingled those services in an integrated multiline (regular) huntline group arrangement. Each type of access would normally pay a different rate per access line, but when these services were commingled, there was no ready way for the telco to assign the correct charges to individual lines. Therefore, under the BSOC 11 arrangement, telcos used a proration formula to allocate line charges. *See AT&T Co.*, Mimeo No. 613, released Nov. 4, 1982.

Section 6.7.3 of the ECA tariff differs markedly from the billing arrangement set forth in BSOC 11. For example, the provision is not restricted to situations where ICs resell WATS in commingled multiline hunt group arrangements. Instead, the terms of Section 6.7.3 merely refer to ICs that use Switched Access Service "in association with" the resale of WATS. The provision is ambiguous in this respect, and should be revised to indicate that the billing arrangement implemented by these provisions is to apply only to access arrangements involving multiline hunt groups.

The provision also incorrectly applies switched access charges to resold WATS usage. The Commission's access rules clearly state that these charges shall not be payable by an IC "to the extent that it resells service for which these charges have already been assessed (e.g., MTS, WATS, and the MTS/WATS type services of other common carriers)." 47 C.F.R. Section 69.5. By limiting the amount of credit for resold WATS minutes to 2500 minutes per line, the tariff would apply switched access charges to WATS minutes in excess of this figure. The BOCs/CSO state that this limitation is made necessary by the usage sensitive access charge structure, where the number of lines provided to ICs is based on the IC's order for busy hour minutes of capacity. In light of the Commission's *Second Reconsideration* decision, which requires OCCs to order switched access on a per line basis rather than on the basis of use, this argument loses whatever force it may have had. In these cases, a formula should be devised

so that one business line rate will be charged for each qualifying WATS line provided. *See supra* discussion of § 3.7(D). Where local exchange service is measured, the average usage per local exchange line should be used for billing local exchange service used with WATS.

In cases where Switched Access charges are assessed on a usage basis, there appears to be no reason to restrict the maximum amount of credit available for resold WATS to 2500 minutes per line. If allowed to take effect, this restriction would result in double assessment of Switched Access charges on WATS minutes used in excess of the maximum credit allowance. Accordingly, this restriction should be deleted. *See supra* discussion of § 3.7(D).

Finally, Section 6.7.3 contains reporting requirements that are essentially identical with provisions set forth in Section 3 of the tariff. *See, e.g.,* discussion of § 3.4. Our disposition of issues raised with respect to that provision apply here. *See supra* discussion of § 3.4(H).

SUBJECT: Switched Access Service — Minimum Monthly Usage Charge

ECA TARIFF REFERENCE: Sections 6.7.4; 6.7.5

TARIFF LANGUAGE:

These provisions set forth minimum charges that apply to Switched Access Service. For those rate elements that are billed a flat monthly rate, the minimum monthly charge is simply the monthly rate assessed (*e.g.* rates for Local Transport Optional Features set forth in Section 6.8.2(B)). For the Local Transport element, however, ICs are required to pay at least the minimum monthly usage charges set out in Section 6.7.5. These charges are assessed per busy hour minute of capacity ordered, and the amount of the minimum charge varies according to the mileage band. In cases where assumed average access minutes are used to assess Switched Access Service charges, the IC will be billed based on minutes assumed, not the minimum monthly usage charge.

ISSUES: Commenters contend that the charges for minimum monthly usage are unreasonable given the traffic sensitive nature of local transport facilities. Moreover, the level of those charges is said to be unsupported. (MCI, LC) In reply, the BOCs/CSO claim that charges assessed for minimum usage are the only viable way to protect both telcos and ICs under the usage sensitive switched access rate structure. Without minimum charges ICs may order capacity, but would pay only for usage after initial nonrecurring charges for the order are assessed. Thus, conceivably, one IC could prevent other ICs from obtaining switched access at no financial risk to itself simply by obtaining the telco's entire inventory of capacity.

DISCUSSION: To some extent, the concerns raised by commenters with respect to minimum monthly usage charges would appear to be resolved as a result of the Commission's decision, on *Second Reconsideration* to apply a flat per line charge of OCC access under Feature Groups A and B. Because these facilities will not be ordered on the basis of busy hour minutes of capacity, the charges assessed under this provision will not apply.

IC obtaining Feature Group D access, however, would be subject to minimum monthly charges under Section 6.7.4 and 6.7.5. While we are not certain that the problem purportedly addressed by minimum monthly charges (i.e. IC overordering of capacity) is a realistic concern, we are not prepared to dismiss the underlying premise of the charge at this time. Moreover, because the scope of the provision is now limited to Feature Group D access, we expect that future proceedings may adequately address the issues raised by commenters.

SUBJECT: Switched Access Service — Change of Feature Group Type

ECA TARIFF REFERENCE: Section 6.7.6

TARIFF LANGUAGE:

"Changes from one type of Feature Group to another will be treated as a discontinuance of one type of service and a start of another. Nonrecurring charges will apply, with one exception. When an IC upgrades a Feature Group B, C or E service to a Feature Group D service of the same capacity in the same end office, the nonrecurring charges will not apply. If, however, additional Local Transport optional features are added to the service at the time the conversion takes place, the nonrecurring charges for the added features will apply."

ISSUES: Commenters contend that the provision is discriminatory because it applies a charge for conversion from Feature Group A to Feature Group D, but not for other feature groups. Thus, AT&T would escape paying conversion charges, while most other ICs would be required to pay. It has also been suggested that the provision is discriminatory because, under the provision as written, minimum period charges run from the time of conversion, and no credit or proration applies for minimum charges already paid under the IC's original service order. (ASC, ITT, LC, MCI, TSC/SI, USTEL)

DISCUSSION: The ECA has proposed to modify this section as follows:

"Changes from one type of Feature Group to another will be treated as a discontinuance of one type of service and a start of another. Nonrecurring charges will apply, with one exception. When an IC upgrades a Feature Group *A,* B, C or E service to a Feature Group D service of the same capacity in the same end office, the nonrecurring charges will not apply. If, however, additional Local Transport optional features are added to the service at the time the conversion takes place, the nonrecurring charges for the added features will apply. *When an IC upgrades a Feature Group A, B, C, or E to Feature Group D, minimum period obligations will not change, i.e., the time elapsed in the existing minimum period obligations will be credited to the minimum period obligations for Feature Group D. For all other changes from one type of Feature Group to another, new minimum period obligations will be established.*

The proposed modification appears to meet the objections of the commenters, inasmuch as conversions from Feature Group A will be exempted from nonrecurring charges to the same extent that conversions from Feature Groups B and C are exempted from those charges. Moreover, the modification proposed by the ECA would result in a "credit" for minimum period charges for Feature Group upgrades. The provision should therefore be allowed to take effect as modified.

SUBJECT: Switched Access Service — Moves

ECA TARIFF REFERENCE: Section 6.7.7

TARIFF LANGUAGE:

As originally filed, the provision described the charges applied when there is a change in the physical location of either the point of interface at the IC terminal location or the IC terminal location itself. For moves within the same building, a charge equal to the busy hour minute of capacity nonrecurring charge for the capacity affected would be applied. In these cases, there would be no change in the minimum period obligations of the IC. For moves to a different building, the exchange carrier would apply charges as if the IC had discontinued one service and started a new service. In this case, all nonrecurring charges associated with a new service would apply; there would be new minimum period obligations established, and the IC would remain responsible for satisfying all outstanding minimum period charges for the discontinued service.

ISSUES: Commenters contend that charges for moves should be limited to actual labor costs (LC), and that no new minimum period obligations should apply. (ASC, ITT, LC, MCI, TSC/SI, USTEL)

DISCUSSION: The ECA has proposed to modify this section as follows:

"6.7.7 *Moves*

A move involves a change in the physical location of one of the following:

—The point of interface at the IC terminal location

—The IC terminal location

The charges for the move and the associated minimum period obligations are dependent on whether the move is to a new location within the same *wire center area or to a different wire center area. Further, when the move is within the same wire center area, the level of charging will be dependent on whether the move is to a new location within the same building or to a different building.*

(A) *Moves to a Different Wire Center Area*

When an IC terminal location is moved to a different wire center area, the move will be treated as a disconnect and a start. Full nonrecurring charges will apply and a new minimum period will be established. The IC will also remain responsible for fulfilling all outstanding minimum period obligations associated with the disconnected service.

(B) *Moves Within the Same Wire Center Area*

When an IC terminal location is moved to a new location within the same building or to a different building in the same wire center area, the existing minimum period obligations will continue in effect. The level of charging will be as follows:

(1) Moves Within the Same Building

The IC will be billed an amount equal to one half the busy hour minutes of capacity nonrecurring charge for the capacity affected.

(2) Moves to a Different Building

The IC will be billed an amount equal to the full busy hour minutes of capacity nonrecurring charge for the capacity affected."

In general, the proposed revision does not appear to create an unreasonable structure for treating various types of moves. Because the charges assessed under this provision are expressed in terms of busy hour minutes of capacity, however, this provision should be further revised to comply with this *Order. See supra* main text discussion of Nonrecurring Charges. In addition, the terms "point of interface" and "IC terminal location" should be revised in accordance with our discussion of Section 2.6, *supra.*

SUBJECT: Switched Access Service — Measuring Access Minutes

ECA TARIFF REFERENCE: Section 6.7.8

"IC traffic to end office switches will be measured (i.e., recorded or assumed) by the Telephone Company at end office switches or access tandem switches. Originating and terminating calls will be measured (i.e., recorded or assumed) by the Telephone Company to determine the access minutes. Access minutes on a terminating call start when the called telephone exchange service location answers and end when the access tandem switch or end office switch receives a disconnect signal. Access minutes on an originating call start when the IC terminal location acknowledges the call and end when the access tandem switch or end office switch receives a disconnect signal."

The assumed average access minutes are as set forth in 3.7(C) except as set forth following."

ISSUES: The provision is said to be ambiguous with respect to the term "measured." In addition, it appears vague because it fails to cross reference alternate assumed average access minute provisions.

DISCUSSION: In light of the Commission's decision on *Second Reconsideration* to assess charges for OCC access charges on a per line rather than per minute basis, it is not necessary to address questions associated with the use of assumed average access minutes at this time. *See supra* discussion of § 3.7(C).

SUBJECT: Switched Access Service — Message Unit Credit

ECA TARIFF REFERENCE: Section 6.7.11

TARIFF LANGUAGE:

"Calls from end users to the seven digit local telephone numbers associated with Feature Groups A or E Switched Access Service are subject to Telephone Company local and/or general exchange service tariff charges, as well as any other applicable charges for IC services. The monthly bills rendered to ICs for their Feature Groups A and E Switched Access Service will include a credit to reflect any message unit charges collected form their customers under the Telephone Company's local and/or general exchange service tariffs. No Message Unit credit is given on the access minutes that have been prorated as set forth in 6.7.3 preceding.

DISCUSSION: In light of the Commission's decision on *Second Reconsideraton,* the last sentence of Section 6.7.11 should be revised to state that no message unit credit will be given *"when local business exchange rates apply* as set forth in 6.7.3 proceeding." *See supra* discussion of § 6.7.3. In addition, while this provision applies a credit for message unit charges assessed upon end users, it does not make clear whether credits will be applied for intrastate toll charges. While the BOCs/CSO have assured us that, for example, an "IC could order Feature Group A capacity to a single end office and gain access to an entire LATA," *BOCs/CSO reply comments* at I-16, it is not clear whether this access would incur toll charges for long distance intrastate calling, or whether credits would apply. This aspect of the tariff should be clarified here. In addition, when these provisions are revised to account for changes mandated by the *Second Reconsideration,* a supplemental narrative statement should be provided to explain, generally, the charges applicable to originating and terminating Feature Group A access.

SUBJECT: Switched Access Service — Mileage Measurement — Exceptions for Feature Groups A and E

ECA TARIFF REFERENCE: Section 6.7.13(A) and (D)

TARIFF LANGUAGE:

Section 6.7.13 provides that the mileage to be used to determine the monthly rate for Local Transport is calculated as the airline distance between the end office switch where the call carried by Local Transport originates or terminates and the IC serving wire center. Section 6.7.13(A) sets forth an exception to this general rule as follows:

"(A) Mileage for access minutes in the originating direction over Feature Groups A and E Switched Access Service will be calculated on airline basis, using the V&H coordinates method, between the end office switch where the Feature Groups A and E End Office

switching dial tone is provided and the IC serving wire center for the Switched Access Service provided."

Section 6.7.13(D) sets forth an additional exception to the general rule that mileage will be calculated from the IC serving wire center to the originating or terminating end office switch:

"(D) When Feature Group A, B or E Switched Access Service terminates in end offices not equipped with measurement capabilities, mileage will be calculated from the IC serving wire center to the entry switch."

ISSUES: Lexitel contends that these exceptions, taken together, are ambiguous and create uncertainty with regard to the application of toll charges to Feature Group A originating and terminating usage. Because an IC's network configuration may depend on the applicability of such charges, this ambiguity must be clarified.

DISCUSSION: In light of the Commission's *Second Reconsideration* decision applying flat per line charges to OCC access under Feature Groups A and B, the problem of ambiguity referred to by Lexitel need not be addressed at this time.

SUBJECT: Switched Access Service — Mileage Measurement — Exception for non-AT&T IC terminal located within five miles of an AT&T Class 4 office.

ECA TARIFF REFERENCE: Section 6.7.13(B)

TARIFF LANGUAGE:

Under Section 6.7.13, the mileage to be used to determine the monthly rate for Local Transport is calculated on the airline distance between the end office switch where the call carried by Local Transport originates or terminates and the IC serving wire center. Section 6.7.13(B) sets forth an exception to this general rule as follows:

"(B) When a non AT&T IC terminal location is within five miles of an AT&T Class 4 office, the Local Transport mileage for a call which is carried over a Switched Access Service, originating or terminating through an end office switch, shall be the distance as would be determined from that end office switch to the serving wire center for that AT&T Class 4 office, unless the IC specifies that for an entire LATA, it wants all measurements determined from its serving wire center. This designation (i.e., which serving wire center to use in calculating mileage) may be changed only once in any 12 month period and when it is changed, the IC will be billed for the change as set forth in 5.6 preceding."

ISSUES: ITT contends that there is no reason to limit the ICs election to use its own mileage, rather that AT&T's, to a LATA-wide basis. Moreover, there appears to be no reason why the IC is restricted to one election per 12 month period.

DISCUSSION: Our review of the supporting materials filed with the ECA tariff indicates no justification for the LATA-wide election or 12 month minimum period restrictions in this section. These limitations should be explained and justified or deleted.

SUBJECT: Switched Access Service — Mileage Measurement — Exception for ICs that select Alternate Traffic Routing Optional Feature

ECA TARIFF REFERENCE: Section 6.7.13(C)

TARIFF LANGUAGE:

Under Section 6.7.13, the mileage to be used to determine the monthly rate for Local Transport is calculated on the airline distance between the end office switch where the call

carried by Local Transport originates or terminates and the IC serving wire center. Section 6.7.13(C) sets forth an exception to this general rule as follows:

"(C) When the Alternate Traffic Routing optional Feature is provided with Feature Groups B, C, and D, the Local Transport access minutes mileage for all calls shall be the mileage to the most distant IC serving wire center from the end office switch where the arrangement is provided. If Feature Group B alternate routed traffic has the shorter of the two routes within five miles of an AT&T Class 4 office, then the shorter route will apply for measuring mileage if the IC has opted for the five mile rule in (B) above."

Section 6.7.13(E) sets forth a further exception to this general rule as follows:

"(E) When Feature Group A, B or E Switched Access Service terminates in end offices not equipped with measurement capabilities, mileage will be calculated from the IC serving wire center to the entry switch."

ISSUES: AT&T claims that, in situations where end offices are "dual homed" on AT&T class 4 offices, these two exceptions taken together will allow the telco to avoid charging for Local Transport based on actual distance between the IC's serving wire center and end offices, where one end office is not equipped for measurement.

DISCUSSION: The EA has proposed to modify both Sections 6.7.13(C) and (E) as follows:

"(C) When the Alternate Traffic Routing optional Feature is provided with Feature Groups B, C, and D, the Local transport access minutes *will be apportioned between the two trunk groups used to provide this feature. Such apportionment will be made using standard Telephone Company traffic engineering methodology and will be based on the last trunk CCS desired for the high usage group, as described in 6.3.1(O) preceding, and the total busy hour minutes of capacity ordered to the end office, when the feature is provided at an end office switch, or to the subtending end offices when the feature is provided at an access tandem switch. This apportionment will serve as the basis for Local Transport mileage calculation.* If feature Group B alternate routed traffic has the shorter of the two routes within five miles of an AT&T class 4 office, then the shorter route will apply for measuring mileage if the IC has opted for the five mile rule in (B) above.

(E) When terminating feature group C Switched Access Service is provided from Multiple IC terminal locations to an end office not equipped with measurement capabilities, *the total Local Transport access minutes for that end office will be apportioned among the trunk groups accessing the end office on the basis of the individual busy hour minutes of capacity ordered for each of those trunk groups. This apportionment will serve as the basis for Local Transport mileage calculation."*

The provision remains unclear with respect to the definition of a "subtending" end office. If this term is defined, however, we will allow the proposed revisions to be made since they appear to meet the objection of the commenter.

SUBJECT: Switched Access Service — Rates and Charges — Interface Group Service

ECA TARIFF REFERENCE: Section 6.8.1(A)

TARIFF LANGUAGE:

The provision imposes a nonrecurring charge of $10.00 per busy hour minute of capacity ordered.

ISSUES: Commenters argue that the nonrecurring charge for Access Connection Interface Groups is not cost justified; that the charge disproportionately affects ICs other than AT&T because it applies only to new capacity ordered and because only AT&T can accurately predict usage to individual end offices; and that the tariff structure improperly "bundles"

nonchargeable options. (ACS, ITT, LC, MCI, SBS, TSC/SI). Reply comments filed by the BOCs/CSO, however, state that IC orders for BHMC impose new installation costs upon the telco, and that the assessment of charges based on units of capacity are the most economically efficient way of recovering these costs. The nonrecurring charges are also said to promote efficiency in that they discourage ICs from overordering capacity.

DISCUSSION: Nonrecurring charges have been addressed within the main text of this *Order*. This provision should be revised accordingly.

SUBJECT: Switched Access Service — Rates and Charges — Access Connections — Interface Group Nonchargeable Optional Features — IC Specified Entry Switch Receive Level

ECA TARIFF REFERENCE: Section 6.8.1(B)(2)

TARIFF LANGUAGE:

Section 6.8.1(B) sets forth ordering codes for Access Connection Interface Group nonchargeable optional features. With respect to the "IC Specified Entry Switch Receive Level," Section 6.8.1(B)(2) provides that the IC may specify the receive transmission level at the first point of switching "within a range acceptable to the Telephone Company."

DISCUSSION: This feature is described as a nonchargeable "option." From the text of Section 6.8.1(B)(2), however, it appears that the Entry Switch Receive Level feature is optional only within the discretion of the telco. While it does not appear unreasonable for the exchange carrier to limit the availability of this option to certain ranges, the parameters of the acceptable range should be specified in the tariff.

SUBJECT: Switched Access Service — Rates and Charges — Local Transport

ECA TARIFF REFERENCE: Section 6.8.2(A)

TARIFF LANGUAGE:

The provision sets forth the mileage bands and charges per access minute for the local transport function as follows:

"Call Miles	*Rates Per Access Minute*
0 to 1	$0.0044
over 1 to 8	0.0101
over 8 to 16	0.0117
over 16 to 25	0.0126
over 25 to 50	0.0203
over 50 to 100	0.0285
over 100	0.0453"

Issues: Commenters contend that the mileage bands and rates provided in this section are unsupported, and that the selection of mileage bands discriminates against ICs that typically locate offices within shorter distances than 8 miles. (ACS, ITT)

Discussion: Issues raised with respect to the charging system for Local Transport mileage per access minute have been discussed in the Commission's *Second Reconsideration*. With respect to access obtained under Feature Groups A and B, it would appear that the concerns raised by commenters need not be addressed at this time. However, we remain concerned that

the mileage band structure developed by the ECA unfairly disadvantages ICs obtaining access under Feature Group D. For example, the large disparity between rates per access minute for calls shorter then one mile as against the charge for calls between one and eight miles, remains unjustified. The selection of mileage bands proposed by the ECA should be fully explained and justified.

SUBJECT: Switched Access Service — Rates and Charges — Line Terminations

ECA TARIFF REFERENCE: Section 6.8.3(B)

TARIFF LANGUAGE:

"(B) Line Terminations

(1) Common Line and dedicated Access Lines service terminations" $0.0085

ISSUES: SBS claims that the line termination charge is unfairly set at the premium level for all ICs, and suggests that a less "discriminatory" method of calculating these charges would be to use a Toll Weighting Factor to discount line termination rates for OCC access (similar to the approach used under ENFIA) to reflect non-premium access differentials in this rate element.

DISCUSSION: In light of the Commission's decision on *Second Reconsideration* to apply a per line charge for OCC access under Feature Groups A and B, SBS's suggestion with respect to Line Termination charges is moot, inasmuch as the premium/nonpremium discount now applied to all elements of OCC access.

SUBJECT: Switched Access Service — Rates and Charges — Local Business Line Rates for Resold Services

ECA TARIFF REFERENCE: Section 6.8.4

TARIFF LANGUAGE:

"The local business line rates that apply for arrangements provided as set forth in 6.7.3 preceding are the same as the local business exchange service rates as set forth in the general and/or local exchange service tariffs of the Telephone Company applicable to the exchange involved and type of equipment at the IC terminal location. The local business line rate also includes any End User Access Service charges authorized by the F.C.C. and/or state regulatory commissions."

DISCUSSION: In order to avoid confusion, this provision should be revised as follows:

"The local business line rates that apply for arrangements provided as set forth in 6.7.3 preceding are the same as the local business exchange rates generally applicable to local business customers, as set forth in the general and/or local exchange service tariffs of the Telephone Company."

Section 7. Special Access Service

Special Access includes a variety of services and facilities associated primarily with local area private lines. All exchange access arrangements that do not use local end office switching, as well as the facilities dedicated solely to an IC's use, are included in Special Access. Services and facilities are grouped under Special Access "to ensure that tariffed access charges of all exchange carriers encompass services and facilities

that the divested BOCs will be offering pursuant to tariffed access charges"[1] as mandated by the MFJ. Special Access involves the most basic of transmission capabilities — a transmission path between two or more points within the same LATA — as well as supplemental features and functions to improve the quality and utility of the transmission between these points.

The Commission stated in the *Access Charge Order* that although Special Access is described as an element for cost allocation purposes, the category "in fact encompasses a number of elements which must be priced separately."[2] For example, facilities for both video program transmission and voice-grade lines are included in the Special Access element. Because the cost characteristics of such services may be significantly different, the same charges could not justly be assessed to users of these distinct services. Nonetheless, the Commission declined to establish subelements of Special Access or to provide guidelines for apportioning the Special Access revenue requirements among the rate elements:

> This proceeding was not designed to develop criteria for designating such subelements or for apportioning costs among appropriate subelements and the record in this docket does not contain much information that would be useful for those purposes.[3]

The Commission further stated that the "the absence of detailed rules for the computation of Special Access subelements does not relieve exchange carriers from any of their statutory duties."[4] The carriers' choices of subelements and supporting cost data are the subject of close scrutiny to ensure their compliance with the requirements of the Communications Act.[5]

The ECA tariff proposes four Special Access subelements or rate categories: Access Connection, Special Transport, Features and Functions, and Special Access Line.[6]

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[1] *Access Charge Order* at para. 246; *see also First Reconsideration Order* at para. 150. As the Commission stated in the *Third Report and Order*, "[i]f the MFJ did not exist, we would probably exclude these facilities from the access charge scheme and classify them as 'interexchange' for this purpose." *Third Report and Order* at para. 246.

[2] *Access Charge Order* at para. 248.

[3] *Third Report and Order* at para. 249; *See also First Reconsideration at* para. 150. Petitions by Ad Hoc and Western Union to reconsider that decision and to provide guidelines for defining and pricing Special Access subelements were denied in the *First Reconsideration order* at para. 150.

[4] *First Reconsideration Order* at para. 151.

[5] *Id.*

[6] Section 7.1.1 sets forth the four categories and provides that "[u]nless specifically stated otherwise, each of the rate categories will apply for each Special Access Service provided to an IC." The diagram in the text above appears in the ECA Tariff at 263.

The Access Connection subelement provides a channel between the IC terminal location and the wire center serving the IC terminal location.[7] Proposed charges for this subelement consist of recurring flat monthly or daily rates determined by the type of facility ordered.[8]

As proposed, Special Transport provides the transmission facilities between (1) an IC terminal location serving wire center and the end user serving wire center, (2) an IC terminal location serving wire center and a Hub, (3) a Hub and an end user serving wire center, or (4) an end user serving wire center and a WATS or WATS type serving office "(for Dedicated Access Line Service only)".[9] The Special Transport rate category is distance sensitive and varies by type of facility. For each type of facility two component recurring charges are proposed: a fixed monthly rate for each "mileage band" grouping and a per mile charge that varies according to the airline distance involved.[10]

The third rate category proposed, Features and Functions, provides facility interface combinations (including signaling), Hub functions (i.e., bridging and multiplexing) and other options to improve the quality or utility of a service to meet specific communications requirements. There is also a separate charge for Voice Grade Performance which is included in this rate category. The Voice Grade Performance charge proposed applies to all Voice Grade Services (VG1-VG13) ordered by the IC.[11] Proposed charges for the Features and Functions rate element vary according to the facility or service ordered and include monthly per service termination rates plus non-recurring "First Service" and "Additional Service" per service termination charges.[12]

The fourth proposed subelement, Special Access Line (SAL), provides a channel between the wire center serving the end user premises and the end user premises.[13] Charges for SAL vary by type of facility ordered and include recurring monthly or daily rates plus, for some facilities, non-recurring "First" and "Additional" charges.[14]

In addition to these rates and charges, the *First Reconsideration Order* established a monthly Special Access Surcharge "to address the problems raised by interconnection by users of the closed ends of certain private lines and WATS lines."[15] The Special Access Surcharge of $25 per line termination was intended to compensate the telephone company for

[7] Section 7.1.1.(A).
[8] Section 7.5.1.
[9] Section 7.1.1.(B).
[10] Section 7.5.2.
[11] Section 7.1.1(C).
[12] Section 7.5.3.
[13] Section 7.1.1(D).
[14] Section 7.5.4.
[15] *First Reconsideration* at para. 151.

use of the local exchange network by Special Access Services that are classified as within interstate jurisdiction. Because not all Special Access Services can use the local exchange network, certain uses of Special Access Service were exempt from the surcharge. Five specific exempted terminations were listed in the Rules.[16]

In the *Second Reconsideration Order* the Commission modified the categories of service exempted from the Special Access Surcharge. Private line customers which certify to their exchange carriers that their private lines do not terminate in a PBX or other device that can interconnect the private line with local exchange service subscriber lines will be exempt from the surcharge. The Access Charge rules have been modified in this regard, and the access tariffs must be amended to reflect this modification.[17] All references to the application of the Special Access Surcharge should be set forth in a single section and should conform to the language set forth in the *Second Reconsideration Order.*

Many parties filed comments about the proposed Special Access provisions of the ECA tariff. The proposed rates and charges for Special Access subelements prompted the most controversy, with commenters challenging the size of the proposed increases, the disparity of rates among telephone companies and the rate structure.

Because the rate structure proposed for Special Access is radically different from the rate structure under which those services are presently provided, it is difficult to compare proposed rates with present rates or to assess the overall impact of those rate changes on the market. It appears, however, that for at least some customers rate increases will be enormous — up to several hundred or even several thousand percent. Commenters allege, for example, that installation charges under the Special Access provisions will increase from the present $78.05 in AT&T Tariff F.C.C. No. 260 to $530.47 under the ECA tariff. In some circumstances those charges could go as high as $1600 per installation. It also appears that for some carriers rates will decrease drastically. For example, the present charge for interconnecting a CCSA machine to a Centrex CO located in adjacent AT&T and exchange carrier offices is $41.25. Under the proposed ECA tariff, this charge would be $3.67. In addition, all non-recurring Special Access charges are placed on the installation at the end user premises, with no installation charge for an Access Connection to an IC premises. Drastic increases in the non-recurring charges could thwart the efforts of OCCs to expand and diversify their services. Large start-up costs in the form of high non-recurring charges would impose a significant barrier to entry or expansion and thus must be closely scrutinized.

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[16] Section 69.115(a), (c) and (e) of the Commission's Rules, 47 C.F.R. § 69.115(a), (c) and (e).

[17] Section 7.4.2(B) of ECA Tariff F.C.C. No. 1.

Furthermore, under the ECA proposal there would be wide disparities in rates charged different customers for similar services. For example, a connection between an exchange carrier Centrex CO and an AT&T CCSA machine located in the same serving wire center area would be provided as an Access Connection at a monthly rate of $3.67 for a two wire connection, with no installation charge. In a similar situation, however, a customer owning and wishing to interconnect two PBX systems at two different premises within the same wire center area would be charged for a Special Access Line from the first PBX location to a wire center, an Access Connection to an IC,[18] and another Special Access Line to the second PBX location. The total charge in this latter example would be approximately twenty times the first, even though the services received in the two examples are the same, *i.e.*, connections assumed to be the same length.

In addition, there are tremendous variations among local exchange carriers and the ECA tariff in charges for Special Access elements. For example, comments point out that C&P Telephone of Virginia would charge $1243.51 for installation of a typical voice grade Special Access circuit; the ECA charge would be $647.93 for this installation; Illinois Bell would charge $338.68; and Pacific Telephone would charge $983.00.[19]

These variations are a strong indication that the rates are not cost based. Although we support any carrier efforts to recover legitimate service costs through a reasonable mix of non-recurring and recurring charges, we find the proposed ECA charges for Special Access do not withstand close scrutiny and we, therefore, reject them. The studies submitted by the carriers fail to justify the great increases over existing charges, the substantial variations in charges for similar services to different customers or the substantial variations in charges among the telephone companies. There has been no demonstration that any of these rates or rate variations are reasonable. Commenters urge that if the rates are demonstrated to be reasonable, due to the size of the increases in many cases and the drastic impact these increases could be expected to have on the market, they should be phased in gradually to reduce the shock to the market. We need not address this proposal at this time since it has not yet been determined that the rates are reasonable.

Many of the rate discrepancies described above appear to result from the proposed pricing structure which selectively disaggregates certain cost elements. As we discuss below, this structure results in unjustified discrimination among customers, confusion and ambiguity in rate calcula-

[18] Although the tariff is unclear, we assume that this connection is required since an end user must connect to an IC service in order to obtain Special Access.

[19] All of these rates represent enormous increases over the present rates of $143 for installation of an outward WATS access line. AT&T Tariff F.C.C. No. 259 (WATS), at 4-8.

tions, and a lack of comparability with existing rates. As a general matter, the rate structure proposed eschews the nature of the products, dedicated telecommunications paths between customer-designated points, and prices instead on the basis of production functions or internal provisioning elements, *i.e.*, facility routing and physical plant layout. Normally, products offered in a market are priced in such a way that the production functions and associated costs are averaged over all units produced (average or marginal cost per unit). Thus, production functions and materials (such as the cost of tin in a can of fruit) are not typically priced separately; not only are they not-of individual concern to consumers, but such pricing mechanisms would be so complex as to be impractical.

If we were to permit the proposed pricing, all significant cost elements associated with the production functions incident to a given product would have to be shown, and not simply a few select ones as proposed in the Special Access structure. Without such a showing, it would be possible for a carrier to select production functions (e.g., channel density in large customer networks, topography variation for microwave relay systems, and physical routing if one or more of the physical function points coincides with a customer's actual service location) which would selectively favor customers with given service attributes.

The proposed structure appears to simulate physical routing. An end user ordering a private line channel between two different points must order a channel to the telephone company wire center (a Special Access Line). If the point to which the end user wishes to interconnect is served by a different wire center, another channel interconnecting the wire centers must be ordered (Special Transport). To connect to the second point, a channel from the serving wire center to the IC location must also be ordered (Access Connection). In contrast, if both points are served by the same wire center, no Special Transport line is necessary but only a Special Access Line and an Access Connection are required. This pricing structure appears to disaggregate and price separately actual service components. In fact, however, the rate structure proposed does not unbundle service components in a manner reasonably related to customer requirements for specific service elements. Nor does it disaggregate all of the price components of any service—only a few are selected. Moreover, it is too narrowly tailored to interexchange carriers in violation of our *First Reconsideration Order* which contemplates that Special Access will be usable by both ICs and end users. We are, therefore, requiring that the structure be revised.

It is a requirement of this Commission's rules that tariffs contain such explanatory statements in clear and explicit terms regarding rates and regulations as may be necessary to remove all doubt as to their proper application. 47 C.F.R. § 61.55 (f). The Special Access Services offering is

fundamentally deficient in this regard, for it does not indicate with the requisite clarity that end users may obtain service under its terms. This problem stems from the fact that no provision is made for providing service to any users except those designated by the term "Interstate Customer." That term is defined in Section 2.6 in a confusing manner which lends itself to conflicting interpretations, as has been noted. See discussion of ECA Tariff Section 2.6, above. Hence, the term "Interstate Customer" might be construed to mean any customer taking service under the tariff, or it might be construed as referring only to carrier customers. If the latter construction were accepted, then it would follow that non-carrier customers would be unable to obtain direct jurisdictionally interstate private line service between two points within a LATA under the proposed tariff.[20] Although the tariff provides for connections between end user premises, such service would have to be ordered by an IC and interconnected with an IC's interstate facilities.[21]

The proposed structure would accord particularly favorable rate treatment to customers who chose to lease telco equipment at the telco wire center rather than employing their own equipment at their own premises. The charge to connect an end user premises at the wire center (as in the case of CENTREX) with an IC premises would be $3.67 per month for two-wire voice service. To connect an end user PBX at the end user premises with an IC in the same serving wire center, the monthly charge would be approximately $38. The proposed structure would also favorably treat ICs who have numerous operating centers and a large customer base. Such an IC would be more likely to have an operating center in the same wire center serving area as the IC's customer. In such cases, no Special Transport is required to connect the customer to the IC's

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[20] A customer, for example, may have switching machines used for interstate private line service located on one or more premises within a local area. A local access line connecting to one of these switches, or a trunk interconnecting two or more such switches, are examples of jurisdictionally interstate private line service even though the entire private line channel might be contained within a local area. In the *First Reconsideration Order*, we noted that there are probably over a million local private line channels which are jurisdictionally interstate.

[21] Although the tariff is ambiguous, it does not appear to permit an end user to interconnect two of its own premises through the use of two Special Access Lines. Section 7.4.5(C) provides that an end user premises can be connected to another end user premises but specifies that an IC would be billed for the service. The provision further states that the end user premises at which connection to interstate service is effected is treated as an IC premises for billing purposes. This, however, is ambiguous as it appears to limit the availability of end user to end user connections to situations where the channel is (1) connected to an IC's interstate service and (2) connected at only one end rather than two, as may be the case with a PBX tie trunk to interstate service. Interconnection of two end user premises without IC intervention is not specifically dealt with in the tariff.

operating center. Finally, the proposed structure gives unjustifiably preferential treatment to ICs vis a vis end users. A connection between an end user premises and a serving wire center would be $34.28 per month whereas such a connection to an IC premises would be $3.67 per month, even where the IC and end user premises are equidistant from the serving wire center. Thus, under the proposed rate structure, the very classification of a customer as an IC or end user has major rate impact.

In establishing the proposed pricing elements for Special Access, the ECA has unbundled selected *cost* elements (or production functions) which are not generally separately useful to customers, rather than *rate* elements (service functions), which might be separately useful. Under the proposed tariff, for example, all customers for Special Access services must take (and pay for) connection to a wire center, regardless of whether they actually need it. This proposed pricing structure, which does not comport with standard pricing conventions or with prior practices in pricing of communications services, has not been justified. With minor exceptions, interstate private line services have always been priced on a straight-line basis between customer designated points regardless of physical routing.[22] Similarly, the pricing of public or common access message services such as MTS and Telex service is based on messages or message units between customer-designated points. The physical routing of the message does not affect the definition of a unit of service rather, it is reflected in the average or marginal cost of providing a unit of service, just as the other costs of production are.

The structure proposed for Special Access is no more than a representational model of only one aspect of cost, *i.e.*, physical routing of channels. Many other cost functions are not disaggregated and thus are presumed to simply follow routing. They are, therefore, loaded more heavily on what are made to appear more complex physical routes such as those entailing Special Transport. Some of these costs, for example, billing or marketing costs, do not necessarily vary with complexity or length of haul. The disparate rate impact of the proposed structure compared with existing rate structures is due, in large part, to this selective disaggregation of cost elements. The pricing structure itself dictates the amount of cost which will be assigned to particular segments of the market, making it appear that all costs, including overhead follow a selective disaggregation of routing elements.

No justification has been provided for singling out physical routing as the principal, if not sole, cost variable governing the development of the Special Access rate structure. By ignoring other cost factors and failing to take into account the manner in which these costs are incurred, an undue

[22] In the MFJ, "telecommunications" is defined as "transmission, between or among points specified by the user, of information of the user's choosing . . ." MFJ, § IV O.

rate emphasis is placed on physical routing and deleterious effects on customers requiring complex configurations under of the rate structure result. A heavy burden of justification is required for a rate structure which, through selective disaggregation of cost elements, so magnifies the importance of one traditionally unrecognized cost element and so dramatically affects a customer's bill.[23]

Moreover, routing between customer and telephone company offices may be far different from that depicted in the model.[24] Routing on any network varies depending on traffic status and many other network considerations. The end user or IC is not necessarily connected to the nearest wire center but may be connected to distant points depending on load and other facility conditions. Also, where a customer would be served by microwave relay instead of underground cable or metallic facilities, the microwave relay stations, which are often located for propagation reasons, may bear little or no correlation in routing to the location of a wire center or central office. Such a customer could be routed, therefore, in a totally different manner from another customer in the same area and served by a different transmission technology. Of more importance in this regard, however, is the fact that where any technology, particularly microwave, is used to serve private line customers, there would not necessarily be any need to transit a wire center or central office at all. Only in cases where the customer has equipment, such as a switch, located at the telco would such a connection be needed. Even in the case of underground cable, customer points could be directly interconnected in many cases. The connection to the central office in the case of private line service principally serves to facilitate maintenance. The customer has neither control over nor necessary interest in how a common carrier decides to route traffic in order to provide a point-to-point private line service. The customer is concerned only to the extent that routing or other engineering factors affect service attributes, e.g., quality or capacity. The point here is that although the rate structure purports to replicate the actual physical routing of private line channels, this may often not be the case. A customer would be charged on the basis of the model configuration even though his service and the costs associated with it bore little or no relation to the applicable rates. To say that this rate structure employs representative routing or reflects the usual configuration is inadequate to refute our criticism; such reasoning contradicts the claim that the rate

[23] *See* American Telephone and Telegraph Company (Multi-Schedule Private Line Rates), 74 FCC 2d 1 (1979), *recon. denied*, 85 FCC 2d 549 (1981).

[24] For instance, a customer location does not necessarily connect to the nearest serving wire center but may, depending on network conditions, connect to a more distant office. Further, the Special Transport segment of the service may traverse a number of offices between the IC serving wire center and the end user.

structure accomplishes an unbundling to comport more closely with actual costs.

One reason for the ECA's choice of rate structure may have been a misunderstanding of what we mean by "unbundling". In recent years, the Commission has attempted to achieve a degree of standardization in service pricing to facilitate regulatory surveillance and to reduce reliance on detailed service cost data. One aspect of this standardization has involved unbundling, or separating out, of rate or pricing elements so that similar or identical rate elements can be compared with one another from service to service. The level of detail to which rates should be unbundled is determined by customer needs. That is, to the extent a useful service element is severable from the overall service it must be unbundled so that the customer does not have to order unneeded service in order to obtain the useful service element.[25]

Under present and historical tariffs, intracity channels generally appear as a single rate element connecting customer-selected communications stations. This single rate element represents a private line which can be used to interconnect any two premises, carrier or non-carrier, without regard to user identity. In contrast, the proposed Special Access pricing structure would "unbundle" this single element into as many as three separate elements which are not generally independently useful to customers and which do not facilitate comparisons between services. This structure would generally disfavor customers who have their own equipment located at their own premises. Customers using terminal equipment functions, *e.g.*, packet switching provided at telephone company premises, would receive inordinate rate advantages over customers choosing to use their own terminal equipment. This charge differential results primarily from the proposed pricing structure and does not necessarily reflect differences in service costs.

A single rate element, representing a point to point private line, would serve all customer service requirements in an even handed manner. Under this pricing structure, a customer requiring, for example, a communications path between two of its own premises would not have to order an unwanted communications path to a wire center and perhaps another path to a second wire center. These latter private lines are simply service the

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[25] The policy guidelines related to rate structure unbundling were first enunciated in American Telephone and Telegraph Company (Notice of Inquiry and Proposed Rulemaking in Docket 79-246), 74 FCC 2d 226 (1979), and later reflected in American Telephone and Telegraph Company (Picturephone Meeting Service), 84 FCC 2d 322 (1981); American Telephone and Telegraph Company (Maintenance of Service Charge Investigation), 82 FCC 2d 370 (1980); American Telephone and Telegraph Company (Bell Packet Switching Service), 91 FCC 2d 1 (1982); and American Telephone and Telegraph Company (International Video Teleconferencing Service), Mimeo No. 433 (released October 27, 1983).

customer does not need. Under the Commission's interpretation of unbundling, the carrier would offer transmission elements in a form which reflects actual service requirements.

If the telephone companies wish to demonstrate that it is, in fact, more costly to interconnect customer premises directly, they can do so under a structure which reflects the unit of service offered, i.e., a communications path between points designated by the customer. If it can then be shown it is reasonable to subclassify this service category into channels connecting other points, e.g., common carrier premises, a rate level difference could be shown. We advise companies who may wish to do this, however, that they must first demonstrate that it is reasonable to allow services to be classified in this manner and if so, *all* service costs, not just a few selected ones, must be shown for each classification.

For the above reasons, we find the proposed pricing structure for Special Access an unreasonable practice under Section 201(b) of the Communications Act, 47 U.S.C. § 201(b). Until the carriers file justified rate structures, we will require that Special Access be structured under the tariff as a single channel, either distance sensitive between customer-designated points or flat rated. See, for example, the local rate center channel rate element under AT&T Tariff F.C.C. No. 270 (Terrestrial Digital Circuits), which is priced on a flat monthly basis regardless of length, and Washington Metropolitan Area Channels under Series 2000 and 3000 in AT&T Tariff F.C.C. No. 260, which are charged for on the basis of airline mileage between customer-designated points.

The rate structures we have defined above apply to intraexchange channels. Since a LATA may include a number of different exchanges or exchange areas, an additional schedule for interexchange channels may be required. In such cases, the rate structures should be similar to existing rate structures for interstate interexchange channels. These consist of an interexchange channel rate element for the channel (or channels) interconnecting the rate centers of the exchanges involved, and a rate for a local distribution channels to connect the terminal of the interexchange rate element with the customer-designated station(s) within the exchange. This latter rate element has been and continues to be insensitive to physical location within an area. If desired, this local distribution rate element can be priced on the basis of distance from the interexchange channel termination to the customer-designated location.

A further pricing structure matter concerns the manner in which intracity or intra-LATA area channels used for voice, data, telegraph and other purposes would be segmented under the proposed tariff. The basic transmission channels for these various services are all the same. As we have stated previously, generic transmission channels must be provided

under single integrated rate schedules.[26] Permitting the same channel to be priced differently according to its use would result in damaging price discrimination. To preclude such discrimination, we are requiring that all wire pair facilities must be priced under a single channel rate schedule regardless of whether they are used for voice, data, facsimile or another purpose. Electrical modifications and special interface features can be offered separately, but customers must be allowed to obtain these basic transmission channels for any compatible purposes under generally applicable rates.

Finally, an additional question arises concerning the continued need and usefulness of copycat tariffs for private line services which customers will be able to obtain under the revised Special Access tariff provisions. We intend to seek comment on this issue in the context of Phase II of this proceeding.

Other specific issues relating to Special Access are discussed in the following sections dealing with specific tariff sections.

SUBJECT: Special Access Service—Rate Categories

ECA TARIFF REFERENCE: § 7.1.1

TARIFF LANGUAGE: "7.1.1 *Rate Categories*

There are four basic rate categories which apply to Special Access Service:

—Access Connection

—Special Transport

—Features and Functions

—Special Access Line

Unless specifically stated otherwise, each of the rate categories will apply for each Special Access Service provided to an IC.

(A) *Access Connection*

This rate category provides a channel between the IC terminal location and the wire center serving the IC terminal location. This rate category varies by type of facility.

(B) *Special Transport*

This rate category provides the actual physical transmission facilities between (1) an IC terminal location serving wire center and the end user serving wire center, (2) an IC terminal location serving wire center and a Hub, (3) a Hub and an end user serving wire center, or (4) an end user serving wire center and a WATS or WATS type serving office (for Dedicated Access Line Service only). The facilities may be either analog or digital. This rate category is distance sensitive and varies by type of facility.

(C) *Features and Functions*

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[26] *See* American Telephone and Telegraph Company (Group/Supergroup Order), 92 FCC 2d 1217 (1983), *recon. denied*, FCC 83-550 (released December 12, 1983); ITT World Communications Inc., Mimeo No. 476 (released October 28, 1983); American Telephone and Telegraph Company (Service to R.R. Donnelley and Sons Company), 89 FCC 2d 1116 (1982); and American Telephone and Telegraph Company (Notice of Inquiry and Proposed Rulemaking in CC Docket No. 79-246), 74 FCC 2d 226 (1979).

This rate category provides available facility interface combinations (including signaling), Hub functions (i.e., bridging and multiplexing and optional features or functions that improve the quality or utility of a service to meet specific communications requirements. In addition, there is a separate charge for Voice Grade Performance which is also included in this rate category. The Voice Grade Performance charge applies for all Voice Grade Services (i.e., VG1-13) ordered by the IC.

(D) *Special Access Line*

This rate category provides a channel between the wire center serving the end user premises and the end user premises. This rate category varies by type of facility."

ISSUES: A number of commenters oppose the rate categories and rate structure proposed. (e.g., GTES, WU, SBS, AHTUC, HTN, Group W, ITT, DJ).

DISCUSSION: As discussed above, we find that the proposed rate structure fails to unbundle service elements which are useful to a customer. Although the structure proposed purports to unbundle four service components, customers are almost always required to take all four components. The service and rate elements must be restructured as discussed above.

The references in this provision and other provisions throughout the tariff to Dedicated Access Line Service should be eliminated in accordance with the *Second Reconsideration Order*. *See also* Discussion in Section 6.

SUBJECT: Special Access Service—Service Configurations, Multipoint Service

ECA TARIFF REFERENCE: § 7.1.4(B) (Issue I)

TARIFF LANGUAGE: (in part):

"The Telephone Company will designate serving wire centers where bridging (by service type) is available. These serving wire centers are referred to as Hubs."

ISSUES: The telephone company is given discretion regarding the designation of serving wire centers and yet no standards for exercise of that discretion are specified. None of the tariffs filed have designated serving wire centers. (WU).

DISCUSSION: This provision and similar ones in the tariff fail to specify where wire centers are located. This problem will be eliminated by the restructuring of point-to-point and multipoint channels which we are directing herein. *See also* Discussion in Section 7.2.1(B) (Issue I).

SUBJECT: Special Access Service—Service Configurations, Multipoint Service

ECA TARIFF REFERENCE: § 7.1.4(B) (Issue II)

TARIFF LANGUAGE:

"The rates to be applied at the IC terminal location are those for the facility interface combination with the highest rates at the initial installation of service."

DISCUSSION: The BOCs and CSO have proposed a "correction" to this section which would amend it to read " . . . highest monthly rate at the initial installation of services". We allow this minor technical clarification.

SUBJECT: Special Access Service—Alternate Use

ECA TARIFF REFERENCE: § 7.1.5

TARIFF LANGUAGE: (in part):

"The Telephone Company will review each request for alternate use on an individual case basis. If it agrees to allow the alternate use, the arrangement required to transfer the service from one operation to the other (i.e., the transfer relay and control leads) will be rated and provided on an individual case basis and filed in Section 12., Specialized Service or Arrangements."

ISSUES: As MCI and WU point out, this provision gives the telephone company broad discretion to "review" and determine whether to "allow" alternate use.

DISCUSSION: This provision gives the telco broad discretion to limit or deny a customer's choice of how a service is to be used. Such restrictions on alternate use create the potential for discrimination and should be eliminated. This provision should either be amended to state that customers may use a service as they choose, within specific technical protection parameters, or deleted.

SUBJECT: Special Access Service—Design Layout Report

ECA TARIFF REFERENCE: § 7.1.7; *See also* § 6.1.5

OTHER TARIFF REFERENCES: GTE Access Tariff

TARIFF LANGUAGE:

"7.1.7 *Design Layout Report*

The Telephone Company will provide to the IC the make-up of the facilities and services provided under this tariff as Special Access to aid the IC in designing its overall service. This information will be provided in the form of a Design Layout Report. The Design Layout Report will be provided to the IC at no charge."

DISCUSSION: This provision should specify when the telco will provide Design Layout Reports. *See* Discussion of Section 6.1.5.

As WU notes, the GTE Access tariff has no provision for design layout reports. The tariff should be amended to set forth that design layout reports will be provided at specified times.

SUBJECT: Special Access Service—Acceptance Testing

ECA TARIFF REFERENCE: § 7.1.8 (Issue I); *See also* § 6.1.6

OTHER TARIFF REFERENCES: GTE Access Tariff

TARIFF LANGUAGE: (in part):

"7.1.8 *Acceptance Testing*

At no additional charge, the Telephone Company will, at the IC's request, cooperatively test, at the time of installation, the following parameters:

For Voice Grade (VG) Services 1, 2, 3, 6, 7, 8, 9, 10, 11 and 12: loss, 3-tone slope, dc continuity and operational signaling. When the Access Connection provides a four-wire voice transmission interface and the network interface provides two-wire voice transmission, (i.e., there is a four-wire to two-wire conversion in Special Transport), balance (equal level echo path loss) may also be tested. Additionally, C-notched noise tests will be provided on VG6, 7, 8, 9, 10, 11 and 12.

All other Access Services will be tested to the performances parameters specified for the individual services."

ISSUES: Commenters contend that this testing provision is unjust and unreasonable. (WU, ISACOMM, RCA).

WU notes that the GTE access tariff sets forth no free acceptance testing.

DISCUSSION: As we have required above, the voice grade transmission channels are to be restructured and provided as a single transmission offering. This provision should be amended accordingly. *See* Discussion in Section 7.1.2(B); *See also* Discussion in Section 6.1.6.

The BOCs and CSO propose a "correction" in the first quoted paragraph to include VG 4 and 5 in the first line and VG 5 in the last line of the paragraph. These amendments are inconsistent with the restructuring of the voice grade channel that we require herein. *See* Discussion in Section 7.1.2(B).

The GTE access tariff should be amended to include a provision for acceptance testing consistent with our direction herein for the ECA access tariff.

SUBJECT: Special Access Service—Acceptance Testing

ECA TARIFF REFERENCE: § 7.1.8 (Issue II); *See also* § 6.1.6.

TARIFF LANGUAGE: (in part):

"If acceptance tests are not started within 30 minutes after the scheduled appointment time for such tests, as negotiated between the Telephone Company and the IC, additional charges will apply, as set forth in 13.2.6(B) following."

ISSUES: As AT&T points out, this provision is ambiguous and could be read to make the IC liable even if the telephone company is responsible for the delay.

DISCUSSION: The BOCs and the CSO propose to amend the last sentence to read:

"... additional charges will apply, as set forth in 13.2.6(B) following unless the delay is caused by the Telephone Company."

The proposed revision is necessary to clarify that the IC will not be penalized if the telco causes the delay. However, justification for the 30 minute period should also be given or a period of time which can be justified should be selected. *See* Discussion in Section 6.1.6 regarding acceptance testing.

SUBJECT: Special Access Service—Ordering Options and Conditions

ECA TARIFF REFERENCE: § 7.1.9; *See also* § 5

TARIFF LANGUAGE:

"7.1.9 *Ordering Options and Conditions*

There are two ordering options available to an IC in the provision of Special Access Service. These are:

—Access Order

—Planned Facilities Order

These options are set forth in detail in 5. preceding, as are the conditions under which the options may be elected. Cancellation charges associated with these options are also included in 5. preceding."

ISSUES: Several commenters contend that the ordering options set forth for Special Access services are unjust, unreasonable and anticompetitive. (*e.g.*, WU, RCA, DJ).

DISCUSSION: *See* Discussion in Section 5.

SUBJECT: Special Access Service—Jurisdictional Report Requirements

ECA TARIFF REFERENCE: § 7.1.10; *See also* §§ 2.3.14, 2.3.15

TARIFF LANGUAGE:

"7.1.10 *Jurisdictional Report Requirements*

When an IC orders Special Access Service for both interstate and intrastate use, the IC is responsible for providing reports as set forth in 2.3.14 preceding. Charges will be apportioned in accordance with these reports. The method to be used for determining the interstate charges is set forth in 2.3.15 preceding."

ISSUES: WU contends that Special Access users should not be required to provide reports on usage because access rates are not usage based. WU asserts that its telex network does not allow it to determine how much traffic moves on an inter- or intra-state basis from any particular terminal.

DISCUSSION: Because Special Access is priced on a monthly rather than usage basis, it is unclear what purpose this reporting requirement serves. This provision should be eliminated. *See also* Discussion in Sections 2.3.14, 2.3.15.

SUBJECT: Special Access Service—Technical Service Descriptions for Special Access

ECA TARIFF REFERENCE: § 7.2 (Issue I); *See also* §§ 6.4, 7.2.1(B) (Issue I)

OTHER TARIFF REFERENCES: South Central Bell

TARIFF LANGUAGE: (in part):

"7.2 *Technical Service Descriptions for Special Access Service*

Special Access Service may be either analog or digital. Analog services are differentiated by spectrum and bandwidth. Digital services are differentiated by bit rate.

There are six major categories of analog service and three digital services. These are:

—Analog: Narrowband
Voice Grade
Program Audio
Video
Wideband
Dedicated Access Line Service

—Digital: Wideband
Digital Data
High Capacity

Each of these, except Dedicated Access Line Service, are further broken down into a number of subcategories."

ISSUES: Several commenters express concern that the provisions of Section 7.2 fail to adequately describe transmission standards for the services offered (AT&T, GTES, ITTCOM, LC, MCI, RCA, SBS, USTEL and WU). USTEL and others contend that the tariff presents only "Immediate Action" technical limits, not expected or normal levels of performance.

WU notes that South Central Bell does not provide any references to technical documents.

The BOCs/CSO reply that the proposed transmission standards are essentially equal to, or are greater than, those provided in docket No. 20099. In their reply they also state that

maintenance and acceptance limits are being developed and will later be provided in Technical Reference publications.

DISCUSSION: A number of the issues raised by the commenters are discussed elsewhere. For a discussion of the issue of the adequacy of the performance standards, see Sections 6.4 and 7.2.1(B). For a discussion of the manner in which the channels are listed in this section and associated service features described, see Section 7.2.1(B) (Issue I).

One remaining issue is the way in which the tariff proposes to denominate the major channel categories e.g., Digital Data and High Capacity. If we permit channels to be defined by use, the same channel could be priced under two or more separate service classifications, which would be unreasonably discriminatory. We do not at this time prescribe what these generic channel types shall be, but rather require the carriers to propose channel classifications and nomenclature consistent with our discussion here and in the other sections.

The reference to Dedicated Access Service must be eliminated. *See* Discussion in Sections 7.1.1, 6.1.2.

SUBJECT: Special Access Service—Technical Service Descriptions for Special Access Service

ECA TARIFF REFERENCE: § 7.2 (Issue II); *See also* § 6.4.

TARIFF LANGUAGE: (in part):

"The Telephone Company will maintain transmission performance on service configurations installed prior to January 1, 1984. All service configurations installed after January 1, 1984 will conform to the transmission performance standards contained in this tariff, except as follows. Where local facility conditions cannot support the transmission performance standards contained in this tariff, transmission standards that can be supported will be uniformly applied to all ICs."

ISSUES: The commenters argue that it is unreasonable that transmission performance will be maintained on facilities existing before the effective date of the tariff, but that the proposed technical specifications for new installations will be maintained only where local facility conditions support them. The commenters contend that the "grandfathering" of engineering standards for facilities in place could unlawfully discriminate in favor of AT&T. Further, the provision is vague with respect to the conditions that will allow lower transmission standards than those set forth. (*e.g.*, USTEL, RCA, WU).

DISCUSSION: *See* Discussion of similar provision in Section 6.4.

SUBJECT: Special Access Service—Technical Service Descriptions for Special Access Service—Narrowband and Voice Grade Services

ECA TARIFF REFERENCE: § 7.2.1(A),(B)

OTHER TARIFF REFERENCES: GTE Access Tariff

TARIFF LANGUAGE:

These provisions set forth the technical descriptions of Narrowband and Voice Grade Services.

DISCUSSION: The services are offered only between an IC terminal location and an end user premises. The services should not be so limited unless a reasonable justification for the limitation is provided.

As WU points out, the GTE access tariff does not have parameters for voice grade special access services and thus provides no guarantee of performance quality. The tariff must be

amended to include technical standards for voice grade Special Access service, consistent with the restructuring of voice grade Special Access service required herein.

SUBJECT: Special Access Service—Technical Service Description—Voice Grade Analog Services

ECA TARIFF REFERENCE: § 7.2.1(B) (Issue I)

TARIFF LANGUAGE:

"There are 13 types of Voice Grade Service, each having a different transmission performance. The transmission performances determine the applications that the various types of Voice Grade Service can be used for."

ISSUES: Transmission services are bundled and thus ICs are unable to simply take a transmission path and add selected features to it.

DISCUSSION: Customers are presented with a choice of bundled services, but the components of the bundled services overlap and the bundles are limited to certain uses. For example, VG2 is essentially the same as VG1, except that the IC has the ability to connect to a Centrex CO and has a few extra features with VG2. Similarly, VG13 creates a separate service category for "physically intraLATA services that are jurisdictionally classified as interstate", yet all of the tariff service offerings meet this description. The tariff does not follow a "building block" rate structure, which minimizes the potential for discrimination, but instead bundles service elements.

The service components should be unbundled so that a customer can build the service it needs. Specifically, the separate subclassifications of voice grade services, VG1 through VG13 must be eliminated and a single voice grade channel, or building block, must be offered in the tariff. This revision will eliminate the unnecessary complexity and duplication created by thirteen voice grade subcategories and thirteen sets of voice grade technical parameters. This revision will also reduce the potential for discrimination created by segmenting the market into thirteen service classifications. To the extent that a customer wants additional features, the customer should be able to order them separately; this illustrates what the Commission means by unbundling.

The proposed tariff restricts a customer's use of services in three ways. First, the voice grade categories are stated to be useful only for specified purposes. Second, the features and functions options are linked to particular channels. Third, alternate uses of a channel are permitted only with the consent of the telco. Unreasonably limiting a customer's use of a service, other than to protect the network, violates the policy enunciated in *Carterfone*.* We therefore require the telcos to eliminate the tariff restrictions on the use of services.

SUBJECT: Special Access Service—Technical Service Descriptions for Special Access Service—Voice Grade Transmission Parameters

ECA TARIFF REFERENCE: § 7.2.1(B) (Issue II)

TARIFF LANGUAGE:

This provision sets forth technical service descriptions for voice grade services.

ISSUES: The commenters contend that the technical descriptions do not include many necessary transmission parameters and that the standards which are in the tariff are set below existing criteria. (SBS, AT&T, WU). The commenters argue that necessary transmis-

* Carterfone, 13 FCC 2d 420 *recon.*, 14 FCC 2d 571 (1968).

sion parameters affecting voice grade Special Access service are omitted from the tariffs or are inadequate as proposed. They contend without such parameters, for example, an IC could not design multipoint circuits using the BOC provided bridging function. AT&T contends that the technical descriptions do not provide necessary parameters for multipoint services, adding substantially to an IC's cost of providing service to its interstate customers.

DISCUSSION: As the commenters have noted, the voice grade transmission parameters proposed contain no standards for phase hits, gain hits or dropouts as part of the data conditioning option. Phase hits occur when the FDM carrier is not in phase or there is switching to alternate transmission facilities. Existing phase modulation modems are sensitive to phase hits and cannot work adequately without a proper threshold. Bell System Technical Reference 41004 states that the standard for phase hits on data lines is no more than 8 hits that are 20 degrees or more in 15 minutes. The commenters maintain that because that standard applies to end-to-end service, even fewer hits should be permitted to apply for end links. Similarly, the standard for gain hits in Bell System Technical Reference 41004 is for no more than 8 gain hits more than 3 decibels from the receive signal in 15 minutes, and the standard for dropouts (signal decreases greater than 12 decibels lasting longer than 4 milliseconds) is no more than 1 in 30 minutes. The commenters maintain that failure to meet these standards causes deterioration of bit error rates on 9600 baud modems which use phase and amplitude modulation.

We are concerned about the issues raised by the commenters yet we find it would be inequitable to seek to impose standards on the exchange carriers which they cannot reasonably be expected to meet at this time. We conclude that many of the concerns of the commenters may be ameliorated by the development of carrier-initiated standards for carrier groups, *e.g.*, different standards for large and for small telcos. We therefore encourage the carriers to establish such standards, perhaps by carrier group.

Until such standards can be developed, we will require certain interim alternative standards which are more stringent than those now proposed in the tariff. These higher interim alternative standards are to be met wherever facility conditions permit. At the telco's discretion, the higher alternative standards may be set forth in the channel conditioning tariff section, Section 7.5.3(D), or in Section 7.2.1(B). References to readily available technical publications may be made upon grant of a special permission waiver.

The tariff should be amended to set forth interim alternative technical standards for phase hit, gain hits, and dropouts, to be met where facility conditions permit. The alternative interim standard should be that which is currently specified in Bell System Technical Reference 41004. This technical reference should be added to page 19 of the ECA access tariff. Other specific interim alternative standards are discussed *infra*.

SUBJECT: Special Access Service—Technical Service Description—Transmission Performance—C Message Noise

ECA TARIFF REFERENCE: §§ 7.2.1(B)(1)(d), 7.2.1(B)(2)(d), etc. *See also* § 6.4

OTHER TARIFF REFERENCE: Rochester Telephone § 7.2.1(B), Central Telephone of Ohio § 5.2.1(B)

TARIFF LANGUAGE:

These provisions set forth C-Message noise parameters.

e.g., § 7.2.1(B)(1)(d) provides, in part:

"—:*C-Message Noise*

The C-Message Noise shall be less than:

Channel Mileage (mi)	*Limit (d BrnCO)**	
	Type V1	*Type V2*
0-50	32	38
51-100	33	39
101-200	35	41
201-400	37	43
401-1000	39	45

* Where facility network conditions will support the parameters, Type V1 will be provided. Where the Type V1 parameters cannot be supported, Type V2 will be provided."

ISSUES: WU and RCA contend that these provisions create unacceptable uncertainty on the part of customers which need to know the noise performance specifications in order to engineer quality end-to-end service. The commenters also contend that the parameters set forth in the tariff are deficient and represent a degradation of service. The commenters further contend that the mileage bands are too large. (WU, SBS, ITTCOM). MCI asserts that different rates should be provided for the two different levels of performance.

WU notes that Rochester Telephone's tariff limits the C-message noise parameter for VG1, 2 and 3 facilities where the channel contains a loop section.

WU also states that the C-message noise parameters in the proposed tariff of Central Telephone of Ohio are even lower than those proposed in the ECA tariff.

DISCUSSION: As the commenters note, there are three kinds of noise with which a Special Access service designer is concerned: C-message noise, C-notched noise, and impulse noise. The parameters provided in this tariff for the first of these three types, C-message noise, are inferior to documented Bell System expectations for the same facilities. The tariff also provides for two levels of noise performance, one for VG1 and another for VG2 and leaves to the telco the decision as to which parameters are applicable. The commenters argue that the proposed parameters represent a significant degradation of the current standards for each end link.

As discussed above, specifying performance standards by exchange carrier groups will alleviate many of the commenters' concerns about the standards. Until standards are established for carrier groups, we require that the telcos offer at least one interim alternative group of standards more stringent than either V1 or V2. *See* Discussion in Section 7.2.1(B) (Issue II).

Further, while we would not object to quality-specific pricing, we are unpersuaded by MCI's argument that we should require such pricing. Differences in quality do not necessarily mean a difference in the cost of providing the service. *See also* the Discussion in Section 6.4 of a similar provision.

SUBJECT: Special Access Service—Technical Service Descriptions, Voice Grade Services—C-Notch Noise

ECA TARIFF REFERENCE: §§ 7.2.1(B)(1)(d), 7.2.1(B)(2)(d), 7.2.1(B)(3)(d), and 7.2.1(B)(4)(d)

TARIFF LANGUAGE:

These provisions set forth the transmission performance standards for VG1, VG2, VG3 and VG4.

ISSUES: WU points out that there are no parameters for C-notch noise for VG1, VG2, VG3, and VG4.

DISCUSSION: The thirteen voice grade channels and the voice grade technical parameters are to be restructured. *See* Discussion in Section 7.2.1(B) (Issue I). C-notch noise parameters should be specified for the restructured voice grade channel.

SUBJECT: Special Access Service—Technical Service Descriptions—Echo Return Loss

ECA TARIFF REFERENCE: §§ 7.2.1(B)(1)(d), 7.2.1(B)(2)(d), etc.

OTHER TARIFF REFERENCE: Bell of Pennsylvania § 7.2.1(B) Rochester Telephone § 7.2.1(B) Central Telephone of Ohio § 5.2.1(B)

TARIFF LANGUAGE:

These provisions set forth the standards for echo control on Special Access voice grade services.

ISSUES: The commenters contend that the parameters for echo control are deficient. (WU, SBS, AT&T).

WU states that the access tariff of Bell of Pennsylvania does not offer improved echo return loss for any voice grade offerings.

WU also states that Rochester Telephone has proposed no improved return loss parameter for VG2.

DISCUSSION: The commenters contend that the ECA tariff does not provide true Echo Return Loss (ERL) values but instead gives an Echo Level Echo Path Loss parameter that provides a derived, as opposed to measured, ERL. They argue that measured ERL parameter is much more useful than the derived parameter and should be provided in the tariff. They argue further that the specifications set forth in the tariff reflect reductions in echo control standards which could result in inadequate service. They maintain that the standards should be set at a level which is at least as stringent as those currently offered to the non-AT&T carriers under OCCEI-5.

As discussed above, we are concerned that it may be unreasonable at this time to require each exchange carrier to meet the standards sought by the commenters. Therefore, until standards can be set on a carrier by carrier or carrier group basis, we will require that the higher standard be specified in the tariff as an interim alternative standard, subject to facility conditions, as discussed in Section 7.2.1(B) (Issue II). The ERL standard specified in the tariff must be the same for all ICs, non-AT&T and AT&T alike.

We are also requiring that the voice grade offerings be restructured as a single transmission offering, as discussed above. Thus, WU's concern regarding Rochester Telephone's voice grade parameters need not be addressed.

SUBJECT: Special Access Service—Technical Service Descriptions, Voice Grade Services—Transmission Performance—Attenuation Distortion

ECA TARIFF REFERENCE: § 7.2.1(B)(1)(d), 7.2.1(B)(2)(d), 7.2.1.(B)(7)(d)

OTHER TARIFF REFERENCE: Rochester Telephone § 7.2.1(B)

TARIFF LANGUAGE:

These provisions set forth the specifications for attenuation distortion.

ISSUES: The commenters contend that the proposed standards are inadequate. (WU, SBS).

WU also notes that the proposed attenuation distortion standards of Rochester Telephone are even lower than the proposed ECA standards.

DISCUSSION: The commenters argue that maintenance limits are needed for attenuation distortion and should be placed in the ECA and other tariffs. They also maintain that specifications for attenuation distortion must be provided for SF signaling.

This provision should be amended to provide an alternative distortion standard, as discussed in Section 7.2.1(B) (Issue II).

Rochester Telephone's tariff should also set forth an alternative attenuation distortion standard.

SUBJECT: Special Access Service—Technical Service Descriptions, Transmission Performance—Impulse Noise

ECA TARIFF REFERENCE: §§ 7.2.1(B)(5)(d),6(d), 7(d), etc.

OTHER TARIFF REFERENCES: Rochester Telephone § 7.2.1(B)

TARIFF LANGUAGE:

These provisions set forth the impulse noise parameters.

ISSUES: The commenters contend that these standards are deficient. (SBS, WU).

Rochester Telephone's tariff sets forth no impulse noise parameter for VG5. (WU).

DISCUSSION: Impulse noise is a short duration, high amplitude noise generally contributed by a switching device. The commenters argue that the impulse noise standards proposed for voice grade services are below current parameters and should be revised to equal or exceed existing standards under Docket 20099. They also contend that acceptance and maintenance limits for impulse noise must be provided in the tariff.

We direct the telcos to amend their tariffs to offer the higher standard proposed by the commenters as an interim alternative standard, as discussed in Section 7.2.1(B) (Issue II).

SUBJECT: Special Access Service—Sealing Current on Special Access Channel VG6

ECA TARIFF REFERENCE: § 7.2.1(B)(6)(C)

TARIFF LANGUAGE:

This provision sets forth the optional features for VG6 Special Access service.

ISSUES: AT&T argues that an option should be provided in the tariff to specify sealing current on VG6.

DISCUSSION: AT&T contends that this provision could cause increased maintenance problems because dry voiceband data channels (with no DC current) are prone to failures that typically cannot be found when test voltage is applied to the circuit.

The thirteen voice grade channels and the voice grade technical parameters are to be restructured. *See* Discussion in 7.2.1(B) (Issue I). A sealing current interim alternative standard should be provided in the tariff in accordance with the Discussion in Section 7.2.1(B) (Issue II).

SUBJECT: Special Access Service—Technical Service Descriptions, Technical Parameters—Envelope Delay Distortion

ECA TARIFF REFERENCE: §§ 7.2.1(B)(6)(d), (7)(d), (8)(d), etc.

TARIFF LANGUAGE:

These provisions set forth the technical parameters for Envelope Delay Distortion.

ISSUES: AT&T and SBS argue that these standards are too low.

DISCUSSION: The commenters define envelope delay distortion (EDD) as the derivative with respect to the frequency of the phase characteristics of the channel. Measuring the derivative is impractical, so it is approximated by a difference measurement in microseconds. The commenters contend that the proposed standard could yield poor data transmission quality.

In their reply, the BOCs and the CSO contend that a customer wanting tighter control of EDD on access services VG5 through VG10 may request C conditioning.

An alternative EDD standard should be offered equal to the values originally proposed in Technical Specification #5 (a technical description of BOC access service offerings circulated by the Central Services Organization via the Interexchange Compatibility Forum). This higher standard should be provided in accordance with our Discussion in Section 7.2.1(B) (Issue II).

SUBJECT: Special Access Service—Technical Service Description—Phase Jitter, Voice Grade 7 (VG7) Special Access Service

ECA TARIFF REFERENCE: § 7.2.1(B)(7)(d)

TARIFF LANGUAGE:

"*Phase Jitter*

The phase jitter over 20-300 Hz shall not exceed 5 degrees peak-to-peak and over 4-300 Hz shall not exceed 10 degrees peak-to-peak."

ISSUES: SBS contends that the phase jitter standard for VG7 is lower than the current standard in OCCEI-5.

DISCUSSION: Phase jitter is a measure of variation (jittering) of a transmitted signal about an ideal point. Phase jitter disturbs the zero crossing of a signal and impairs data transmission. The OCCEI-5 presently provides objectives for phase jitter of 5 degrees peak-to-peak for a distance up to a 200 mile range without limitation as to frequency bands.

The tariff should provide an alternative higher standard with limits no less stringent than those provided in OCCEI-5, as discussed in Section 7.2.1(B) (Issue II).

SUBJECT: Special Access Service—Technical Service Description - Program Audio Services

ECA TARIFF REFERENCE: § 7.2.1(C)

TARIFF LANGUAGE:

These provisions set forth the technical parameters for program audio services.

ISSUES: The commenters contend that the proposed technical parameters are too low and are unacceptable. (WU, AT&T).

DISCUSSION: A number of standards which were included in the Docket 20099 parameters are not contained in the proposed specifications. Furthermore, as AT&T notes, the specifications in Section 7.2.1(C)(4) are not stringent enough to be used on access for program audio overseas circuits.

The following revisions should be set forth as higher alternate standards, as discussed in Section 7.2.1(B) (Issue II). The omitted parameters, including short-term gain stability, crosstalk, distortion (harmonic and/or total), and group delay (for AP4) and short term loss, should be set forth in the tariff. Amplitude tracking, phase tracking and distortion tracking should also be specified where AP4 channels are ordered for stereo service. Additionally, the proposed signal-to-idle noise parameter is much lower than that required in Docket 20099 and

should be amended. Premium Grade Program Audio 5 and 15 kHz offerings with more stringent parameters should also be made available under Sections 7.2.1(C)(2) and 7.2.1(C)(4).

SUBJECT: Special Access Service—Technical Service Descriptions—Program Audio Services

ECA TARIFF REFERENCE: § 7.2.1(C)(1)(a)

TARIFF LANGUAGE:

"(1) *Program Audio 1 (AP1) Special Access Service*

(a) *Description*

Special Access Service AP1 provides a channel with a nominal bandwidth from 200 to 3500 Hz for the transmission of a complex signal voltage, such as speech or music, between an IC terminal location and an end user premises. Only one-way transmission is provided."

ISSUES: The service is available only between an IC terminal location and an end user premises.

DISCUSSION: No justification for the limitation of this service has been provided and the limitation should be deleted.

SUBJECT: Special Access Service—Technical Service Description—Video Services

ECA TARIFF REFERENCE: § 7.2.1(D)

TARIFF LANGUAGE:

This provision sets forth the technical service description for video services.

ISSUES: The proposed specifications are missing many parameters necessary for the provision of television service. (WU).

DISCUSSION: The parameters contained in the national standards for television facilities promulgated by the Electronic Industries Association (RS-250-B, Sept. 1976), as discussed in section 7.2.1(B) (Issue II), should be set forth as higher alternate standards for: insertion gain, long time distortion, field time distortion, line time distortion, short time distortion, chrominance/luminance gain inequality, chrominance/luminance delay inequality, luminance nonlinearity, differential gain, differential phase, signal/loss frequency noise, amplitude versus frequency response, chrominance/luminance intermodulation, chrominance nonlinear gain, chrominance nonlinear phase, dynamic gain (picture signal), dynamic gain (sync. signal), transient sync. signal non-linearity, and video/audio delay difference. The telcos may seek special permission to cross-reference available technical references to establish these alternate standards.

SUBJECT: Special Access Service—Technical Service Description—Video Services

ECA TARIFF REFERENCE: § 7.2.1(D)(1)(a)

TARIFF LANGUAGE:

"(1) *Television 1 (TV1) Special Access Service*

(a) *Description*

Special Access Service TV1 provides a channel with one-way transmission capability for a standard 525 line/60 field monochrome, or National Television Systems Committee color, video signal and one or two associated 15 kHz audio signal(s) between an IC terminal location and an end user premises."

DISCUSSION: The limitation of the service to use between an IC terminal location and an end user premises has not been justified and should be eliminated. Customers should be permitted to use the service in any manner which is not publicly detrimental or harmful to the network. *See also* Discussion in Sections 7.1.5 and 7.2.1(B) (Issue I). In lieu of the proposed limitation, the tariff should specify that 15 kHz audio channels are available between customer-designated premises.

SUBJECT: Special Access Service—Technical Service Description—Wideband Analog Services

ECA TARIFF REFERENCE: § 7.2.1(E)

TARIFF LANGUAGE:

Section 7.2.1(E) sets forth the technical service description for wideband analog special access services.

ISSUES: WU contends that the parameters proposed are inadequate.

DISCUSSION: WU maintains that the parameters proposed in Section 7.2.1(E) fail to ensure adequate performance of wideband analog Special Access services. The parameters, including pilot level variation, gain/frequency, background noise, impulse noise, and amplitude stability, set forth in the Technical Specifications are not provided in the tariff. This provision should be revised in accordance with our Discussion in Sections 7.2.1(B) (Issue II) and 7.2.1 (D).

SUBJECT: Special Access Service—Technical Service Description—Wideband Analog Services

ECA TARIFF REFERENCE: § 7.2.1.(E)(1)(a)

TARIFF LANGUAGE:

"(E) *Wideband Analog Services*

(1) *Wideband Analog 1 (WA1) Special Access Service*

(a) *Description*

Special Access Service WA1 provides a high capacity channel with a bandwidth from 60 kHz to 108 kHz for the transmission of a wideband signal between an IC terminal location and an end user's premises, between an IC terminal location and a Telephone Company designed Hub where multiplexing is offered."

ISSUES: This provision limits the use of Special Access Service WA1.

DISCUSSION: The restriction on the use of this service should be eliminated and customers should be permitted to use the service for any purpose which is not publicly detrimental or harmful to the network. This provision should also be amended to set forth that the channel is available for use between customer designated points. *See also* Discussion in Sections 7.1.5, 7.2.1(B) (Issue I) and 7.2.1(D)(1)(a).

SUBJECT: Special Access Service—Technical Service Description—Dedicated Access Line Service

ECA TARIFF REFERENCE: § 7.2.1(F)(1). *See also* § 6.1.2.

TARIFF LANGUAGE:(in part):

"(F) *Dedicated Access Line Service (DALS)*

(1) *Description*

Special Access Dedicated Access Service provides a channel for voice frequency transmission capability. The service provides a connection between an end user premises (which for purposes of this tariff includes Centrex CO switches) and a Telephone Company switching office capable of performing the necessary screening functions for 800 Service, WATS or similar services."

ISSUES: The commenters contend that this provision is unlawfully discriminatory because the only carrier that will have DALS available to it is AT&T. (LC, WU, Allnet, MCI).

DISCUSSION: Pursuant to our *Second Reconsideration Order,* WATS now falls within Switched Access. This provision and all other references in the tariff to DALS must be amended accordingly. *See* Discussion in Section 6 generally, and Section 6.1.2.

SUBJECT: Special Access Service—Technical Service Descriptions—Digital Services

ECA TARIFF REFERENCE: § 7.2.2

TARIFF LANGUAGE:

These provisions set forth the technical descriptions for the Digital Access Services: Wideband, Digital Data and High Capacity Services.

ISSUES: The provisions limit the service offerings to particular uses, *e.g.* 7.2.2(A)(1)(a), 7.2.2(A)(2)(a), 7.2.2(A)(3)(a), 7.2.2(A)(4)(a), limit use.

DISCUSSION: Limitations on the use of services are unnecessarily restrictive and should be eliminated from the tariff. Customers should be permitted to use the services ordered in any manner which is not harmful to the network and to order a basic transmission "building block" and add whatever features they wish. The tariff restructuring outlined in Section 7.2.1(B) (Issue I) will serve to reduce the unnecessary bundling of services and the limitations of service use. *See also* Discussion in Section 7.1.5.

SUBJECT: Special Access Service—Technical Description—Wideband Digital

ECA TARIFF REFERENCE: § 7.2.2(A)(4)(c)

TARIFF LANGUAGE:

"(c) *Transmission Performance*

—Error-Free Seconds

While in service, the monthly average of the error-free seconds will be equal to or greater than 98.75%."

ISSUES: The performance standard incorporated in this provision is lower than that currently offered for Dataphone Digital Service. (WU).

DISCUSSION: Wideband Digital 4 service is intended to permit access to DDS service but the proposed error-free performance specification of 98.75% is lower than the DDS end-to-end objective of 99.5% stated in Bell System Technical Reference PUB 41021, Section 1.3.1. Nonetheless, the fact that the proposed "standard" is lower than the current "objective" does not necessarily represent a degradation of service. Although we expect to examine the issues

of standards for this and other services, we do not conclude at this time that the proposed standard is unreasonable.

SUBJECT: Special Access Service—Technical Service Description—Digital Services—Available Facility Interface Combinations

ECA TARIFF REFERENCE: §§ 7.2.2(A)(4)(d), 7.2.2(B)(4)(e)

TARIFF LANGUAGE:

7.2.2 (A) (4) (d)	*Available Facility Interface Combinations*	
	" IC	*End User*
	4WB5-64	6DU5-56
	4D05	6DU5-56"
7.2.2 (B) (4) (e)	*" IC*	*End User*
	4DS9-15*	6DU5-56
	6DU5-56	6DU5-56"

ISSUES: AT&T contends that these provisions fail to include the necessary interface for AT&T to provide 56 kbps Dataphone Digital Off-Net Extension Service.

DISCUSSION: Section 7.2.2(A)(4)(d), which deals with the Analog part of Off-Net Extension (WD4) for Special Access Service, refers to a 4D05 (DSX-0) interface. In order to connect this to the DDS portion of the service, the DA4 must also have a 4DO5 (DSX-0) interface. Absent modification of the tariff, ATTCOM will not be able to offer 56 kbps, Dataphone Digital Off-Net Extension Service. An appropriate interface option should be added to the tariff or its omission justified.

SUBJECT: Special Access Service,—Digital Data Access Services

ECA TARIFF REFERENCE: § 7.2.2(B)

TARIFF LANGUAGE:

This provision sets forth the technical service description for Digital Data Access Services.

ISSUES: (1) WU contends that the technical parameters are inadequate because they fail to provide information about voltage.

(2) IDCMA states that the tariff does not specifically provide that users can directly connect Channel Service Unit equivalent equipment to digital services and does not contain an interim direct connection program for Network Channel Terminating Equipment.

DISCUSSION: (1)Section 7.2.2(B) should specify voltages which are compatible with DDS.

(2) In the *CSU Connection Order, Petitions Seeking Amendment of Part 68 of the Commission's Rules Concerning Connection of Telephone Equipment, Systems and Protective Apparatus to the Telephone Network,* FCC 83-268, released June 14, 1983, we determined that Channel Service Units (CSUs), CSU-type devices and other Network Channel Terminating Equipment (NCTE) are customer premises equipment (CPE) and therefore subject to competition. The Commission found that the direct connection of CSU-type equipment by users would be privately beneficial without causing public harm, applying the principles of *Hush-A-Phone, Carterfone,* and *Computer II.*

Nonetheless, the access tariff as filed does not explicitly provide that users can directly connect CSU equivalent equipment to digital services or establish an interim interconnection program.

In its reply to comments on the access tariffs, the BOCs/CSO propose to add the following sentence to Section 7.2.2(B): "The IC is responsible for providing a Channel Service Unit Equivalent at the end user premises." This proposed amendment is inadequate. The tariff should be amended to specifically provide that all customers, not just ICs, may connect CSU-type equipment and other NCTE. The provision should also be amended to set forth an interim interconnection program.

SUBJECT: Special Access Service—Technical Service Description—Digital Data Access Services

ECA TARIFF REFERENCE: § 7.2.2(B)(1)(a), similar provisions in §§ 7.2.2(B)(2)(a), 7.2.2(B)(3)(a)

TARIFF LANGUAGE:(in part):

"(1) *Digital Data Access 1 (DA1) Special Access Service*

(a) *Description*

Special Access Service DA1 provides a channel for duplex four-wire transmission capability of serial synchronous data at the 2.4 kbps rate between an IC terminal location and an end user premises. The service is synchronous with timing provided through the Telephone Company's facilities to the end user on the received bit stream.

DA1 is available only between the IC terminal location and locations designated by the Telephone Company which are served by digital facilities. All other locations are connectible to the Telephone Company designated digital Hub only through an analog off-network extension which is provided as a Voice Grade Service as set forth in 7.2.1(B) preceding."

DISCUSSION: The availability of this service is limited to telco designated digital Hubs. No limitation on the telco's discretion in designating Hubs is specified. The tariff should be amended to state clearly by rate center, NNX code, or both, where the service is to be provided.

SUBJECT: Special Access Service—Technical Service Description—Standards for Error Free Seconds

ECA TARIFF REFERENCE: §§ 7.2.2(B)(1)(d), 7.2.2(B)(2)(d), 7.2.2(B)(3)(d), 7.2.2(B)(4)(d), and 7.2.2(C)(1)(d)
See also § 7.2.2(A)(4)(c)

TARIFF LANGUAGE:

These provisions set forth the error-free seconds transmission performance parameters.

ISSUES: WU contends that the error-free performance standard for High Capacity 1 (HC1) Special Access Service in Section 7.2.2(C)(1)(d), 98.875%, is lower than the 99.875% specified for DDS.

In their reply, the BOCs and CSO propose to eliminate the error-free seconds parameter in the above-referenced sections.

DISCUSSION: The proposed amendment of these sections to eliminate the error-free seconds standard has not been sufficiently justified. The standard as originally proposed should remain or be modified to be more stringent. With regard to WU's argument, *see* Discussion in Section 7.2.2(A)(4)(c).

SUBJECT: Special Access Service—Technical Service Description—Digital Data Access Services—Facility Interfaces

ECA TARIFF REFERENCE: §§ 7.2.2(B)(1)(e), 7.2.2(B)(2)(e) - (B)(4)(e)

TARIFF LANGUAGE:

These provisions set forth the available facility interfaces for digital access.

ISSUES: AT&T alleges that the tariff fails to provide for DATAPORT interface.

DISCUSSION: There are currently several LATAs in which access arrangements are provided through DATAPORT connections which require a single circuit interface. The tariff fails to provide for this type of interface and thereby precludes the continued use of these arrangements. The exchange carriers should address whether a single circuit interface (DS-OA) for digital access should be provided at an interexchange carrier's location to permit an interexchange carrier to connect a single digital circuit (2.4, 4.8, 9.6 and 56 kbps) directly to its customer's premises.

SUBJECT: Special Access Service—Technical Service Descriptions—Digital Data Access Services

ECA TARIFF REFERENCE: § 7.2.2(A)(4)(a), § 7.2.2(B)(4)(a)

TARIFF LANGUAGE:

7.2.2(A)(4) *Wideband Digital 4 (WD4) Special Access Service*

"(a) *Description*

Special Access Service WD4 provides for the transmission of 56 kbps synchronous serial data between an IC terminal location and an end user premises. No voiceband coordinating channel is included with this service."

7.2.2(B)(4) *Digital Data Access 4(DA4) Special Access Service*

"(a) *Description* Special Access Service DA4 provides a channel for duplex four-wire transmission capability of serial synchronous data at the 56 kbps rate between an IC terminal location and an end user premises. The service is synchronous with timing provided through the Telephone Company's facilities to the end user on the received bit stream.

DA4 is available only between the IC terminal location and locations designated by the Telephone Company which are served by digital facilities. All other locations are connectible to the Telephone Company designated digital Hub only through an analog off-network extension which is provided as a Wideband Digital Service as set forth in 7.2.2(A) preceding."

ISSUES: Sections 7.2.2(A)(4)(a) and (B)(4)(a) appear to provide the same functional service.

The telco's discretion to designate facilities is not limited by this provision and no facilities are designated in the tariff.

DISCUSSION: The tariff should not set forth two distinct service offerings for the same basic service but rather should unbundle the basic transmission service from the rest of the offering. By unbundling the basic transmission service customers would be able to "build" a service which meets their individual needs. One of the provisions should be eliminated unless an explanation of the differences in service is provided; a condition on use is not a difference in service for this purpose.

As discussed in Sections 7.1.5 and 7.2.1(B) (Issue I), the manner in which a customer uses a service must not be limited by tariff except to the extent necessary to protect the network. The limitation on use must be eliminated from these sections and similar limitations on use are to be eliminated throughout the tariff, *e.g.*, Sections 7.2.2(B)(1), (2), (3), (4).

SUBJECT: Special Access Service—Technical Service Description—Digital Services—Facility Hub Arrangements

ECA TARIFF REFERENCE: § 7.2.2(B)(1), (B)(2)(a), (B)(3)(a), (B)(4)(a), § 7.2.2 (C)(1)(a), § 7.4.7

TARIFF LANGUAGE:

"7.2.2(B)(1)(a) *Description*

DA1 is available only between the IC terminal location and locations designated by the Telephone Company which are served by digital facilities. All other locations are connectible to the Telephone Company designated digital Hub only through an analog off-network extension which is provided as a Voice Grade Service as set forth in 7.2.1(B) preceding."*

"7.2.2(C)(1)(a) *Description*

Special Access Service HC1 provides a channel for the transmission of normal 1.544 Mbps isochronous serial data between an IC terminal location and an end user premises, between IC terminal locations or between an IC terminal location and a Telephone Company designated Hub where multiplexing is offered." [The IC is responsible for providing a Channel Service Unit Equivalent at the end user premises.]**

"7.4.7 *Facility Hubs*

An IC has the option of ordering high capacity analog or digital facilities (i.e., Group, Supergroup, Mastergroup, DSI, DSIC, DS2, or DS4) to a facility Hub for channelizing to individual services requiring lower capacity facilities (e.g., Voice, Program Audio, etc.)."

ISSUES: AT&T contends that it is unclear under these provisions how an IC can complete DDS access arrangements through the Hub to the customer and alleges that this may present a conflict with the MFJ.

The telco is given discretion to designate digital Hub facilities and no facilities are specified in the tariff.

Use of the service is limited by the tariff.

DISCUSSION: Section 7.2.2(B) provides that Digital Access (DA) 1 through 4 (digital access at 2.4, 4.8, 9.6 and 56 kbps rates, respectively) are only available "between the IC terminal location and the locations designated by the Telephone Company." However, the plan of reorganization, as approved by the court, specifies that the interface at Digital Data System Facility Hubs between AT&T and the divested BOCs for AT&T's DATAPHONE Digital Service (DDS) will be at the DS1 level (1.544 Mbps). Thus, where AT&T must obtain access for its customer for DDS via a Facility Hub, it must do so using 1.544 Mbps facilities under Section 7.2.2(C)(1)(a) and 7.4.7 between its IC terminal and the telephone company Facility Hub. The IC would then use DA 1 through 4 between the Facility Hub and the wire center served by digital facilities. However, because Section 7.2.2(B) does not make DA 1 through 4 available between a Facility Hub and customer locations served by digital facilities, it is unclear how AT&T will obtain DDS access arrangements to complete the connection to its customer.

The tariff should be revised to eliminate the limitations on DA 1 and DA 4. The limitations on use, as discussed above must be eliminated throughout the tariff, except as necessary to protect the network. *See* Discussion in Sections 7.1.5, 7.2.1(B) (Issue I).

Further, the tariff should state that 1.544 Mbps channels are available between customer-designated premises.

SUBJECT: Special Access Service—Rate Regulations—Surcharge for Special Access Service

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* The limitation of use "between the IC terminal location and locations designated by the Telephone Company" is also set forth for DA2, 3, and 4, in Sections 7.2.2(B)(2), (3), and (4) respectively.

** The CSO and BOCs propose to add the bracketed language to Section 7.2.2(C)(1)(a). *See* Discussion in Section 7.2.2(B) regarding this proposed language.

ECA TARIFF REFERENCE: § 7.4.2(A)

TARIFF LANGUAGE:

"7.4.2 *Surcharge for Special Access Service*

(A) *General*

In addition to the rates and charges described in 7.4.1 preceding, there is a monthly surcharge of $25.00 that applies to two-point sub-voice grade, voice grade and equivalent voice grade Special Access Services (e.g., the surcharge for a group level service would be $300.00 or 12 x $25.00). For multipoint services, the $25.00 surcharge applies for each end user location on the service. This surcharge is to compensate the Telephone Company for use of the local exchange network by Special Access Services that are classified as interstate jurisdiction."

ISSUES: It is unclear under this provision how the surcharge is to be applied. Bunker-Ramo and API contend that the tariff should clearly state that the surcharge does not apply to private networks which technically cannot access the local exchange network. UTC contends that the tariff should specifically state how the surcharge will be applied to existing services.

DISCUSSION: This provision must be amended to comply with our *Second Reconsideration Order.* The tariff must specify that the surcharge does not apply to customers which certify to the telco that their private lines do not terminate in a PBX or a device with equivalent interconnection capabilities.

SUBJECT: Special Access Service—Exceptions to the Application of the Special Access Surcharge

ECA TARIFF REFERENCE: § 7.4.2(B)

TARIFF LANGUAGE:

This provision sets forth exemptions from the special access surcharge including television and program audio transmission and telex lines.

ISSUES: Commenters argue that newswire services should be exempted from the Special Surcharge just as radio and television transmission and telex are exempted. (AP and CNS, SATNET, UPI and DJ). AFSA contends that the surcharge should not be applied to terminations of a private line in a data terminal, such as those used by AFSA members. API maintains that high speed data should be exempted and UTC contends that the surcharge is inapplicable to dedicated data channels and terminations used for automatic ring down, control, metering and protective relay. Bunker-Ramo suggests that the surcharge should not apply to private lines connected to "devices" incapable of accessing the local exchange network. UTC contends that the general exemption of Section 7.4.2(B)(3), ("any termination of a service that by nature of its operating characteristics could not make use of common lines"), should be replaced with a list of services and/or applications which meet this criteria. Telocator also argues that its RCC transmitter lines should exempted from the Special Access Surcharge.

DISCUSSION: See Discussion in Section 7.4.2(A).

SUBJECT: Special Access Service—Special Access Surcharge—Reporting Requirements

ECA TARIFF REFERENCE: § 7.4.2.(C)

TARIFF LANGUAGE:

"(C) *Self Reporting*

In order for the Telephone Company to determine the application of the surcharge with respect to specific services, the IC must report the intended use of all services when placing orders for Special Access Service. In addition, when ordering high capacity analog or digital services, the IC must also report the use for each voice equivalent channel of the high capacity service. When any service or channel of a service is reported to be used in any manner described in (B) preceding, the surcharge will not apply. If the intended use is not reported, the Telephone Company will automatically bill the appropriate surcharge on each Special Access Service installed.

The Telephone Company reserves the right to audit the use of the service at any time. If the service is found to be used for a type of operation other than that reported by the IC, and a surcharge would apply for that type of operation, the Telephone company will notify the IC and will begin to apply the surcharge."

ISSUES: Bunker-Ramo contends that the tariff should not place the burden of determining whether the surcharge applies on the exchange carrier.

UTC alleges that the reporting requirement is too vague and may be unreasonably burdensome.

DISCUSSION: This provision must be revised to conform with the customer certification set forth in the *Second Reconsideration Order.* Thus, the provision should be amended to allow an exemption from the surcharge where the customer certifies to the telco that its private lines do not terminate in a PBX or a device with equivalent interconnection capabilities. The tariff must provide that the certification is made by the "customer" rather than the "IC". The verification and auditing procedures proposed in this section should be narrowed and clarified to preclude any unnecessary intrusion of customer privacy.

SUBJECT: Special Access Service—Surcharge for Special Access Service—Crediting the Surcharge

ECA TARIFF REFERENCE: § 7.4.2(D)

TARIFF LANGUAGE:

7.4.2(D) *Crediting the Surcharge*

"If, at any time after the installation of a service which is subject to the surcharge, the IC reports that the service is being used in association with a Switched Access Service that is subject to Carrier Common Line Charges, the Telephone Company will credit the IC for the surcharge. The credit will will be effective on the date that the Special Access Service became associated with the Switched Access Service."

ISSUES: UTC suggests that provision should be added to cover situations in which services are modified after installation and fall within a category of use exempted from the surcharge.

DISCUSSION: UTC proposes that the following paragraph replace Section 7.4.2(D):

If, at any time after the installation of a service which is subject to the surcharge, the IC reports that the service is being used consistent[ly] with Section 7.4.2(B), the Telephone Company will credit the IC for the surcharge. The credit will be effective on the date that the special access service was reconfigured to meet 7.4.2(B).

This language adequately fills a gap in the tariff and should be added to the credit provision. However, we find that the provision must also require the customer to certify that the service is eligible for an exemption, in accordance with the *Second Reconsideration Order.* The credit will become effective upon customer certification.

SUBJECT: Special Access Service—Minimum Periods

ECA TARIFF REFERENCE: § 7.4.3

TARIFF LANGUAGE:

"7.4.3 *Minimum Periods*

Special Access Service is provided for a specified minimum period. The minimum period and the applicable charges for that period are dependent on the interval (i.e., standard, negotiated, or short notice) under which service is provided. An exception to the minimum period exists for part-time and occasional Video and Program Audio services which may be ordered and paid for on a daily basis. Minimum periods and minimum period charges are described in detail in 5. preceding."

DISCUSSION: *See* Discussion in Section 5.

SUBJECT: Special Access Service—Moves

ECA TARIFF REFERENCE: § 7.4.4. *See also* § 5.2.5(A)

TARIFF LANGUAGE:

The provision sets forth the non-recurring charges that apply to moves within the same building (one half the non-recurring installation charges) and to another building (treated as a discontinuance and start of business). A new minimum service period is established upon a move to a different building.*

ISSUES: LC and Allnet contend that initiating a new minimum period is not justified.

DISCUSSION: We conclude that our requirement of a one-month, rather than six-month, minimum service period should substantially ameliorate the concerns of the commenters. *See* Discussion in Section 5.

SUBJECT: Special Access Service—Rate Application Exception Rules, Intrabuilding Access Services

ECA TARIFF REFERENCE: § 7.4.5(A)

TARIFF LANGUAGE:

"(A) *Intrabuilding Access Services*

Intrabuildding cable facilities, provided by the Telephone Company to connect two IC terminal locations or an IC terminal location and an end user premises in the same public building, will be rated as an Access Connection and an appropriate facility interface combination. The Special Transport and Special Access Line rate elements will not apply to this type of service, nor will the Special Access Service Surcharge set forth in 7.4.2 preceding apply."

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* In their reply comments, the BOCs/CSO proposed a modification of this provision which allows a move within the same wire center serving area of the IC's Point of Presence or the end user's premises to occur without extension of the obligation period. This modification reduces the negative effect of this provision. The application of nonrecruiting charges associated with a move of the end user with a wire center serving area would also be modified under the proposed revision to reduce the charge to one-half the total nonrecurring rate.

ISSUES: This provision proposes to exempt intrabuilding cable facilities from the Special Access Surcharge. Further, WU challenges the rate applied to intrabuilding connections. Also, the term "public" building is not defined in the tariff.

DISCUSSION: We have a number of concerns about this provision. The application of, and exemptions to, the Special Access Surcharge should be set forth in a single tariff section rather than provided in a piecemeal fashion. The Special Access Surcharge applications and exemptions must also be modified to conform to our *Second Reconsideration Order.*

Further, as discussed in Section 2.1.5, the tariff should not make references to "IC terminal locations" but rather to an "end user" or "customer" premises.

The term "public" building is unclear. According to our understanding of this provision, Intrabuilding Access Services include connections between exchange carrier offices and offices of co-located customers, *e.g.*, a connection between a Centrex CO and an AT&T CCSA machine. If this interpretation is correct, the Special Access Surcharge should be applied. WU seems to read this provision to apply when two customer terminals are located at the same premises. In any event, our directions to clarify this provision and to restructure the Special Access rates, as discussed above, should ameliorate WU's concern.

SUBJECT: Special Access Service—Rate Application Exception Rules, IC Terminal to IC Terminal Location and End User to End User

ECA TARIFF REFERENCE: § 7.4.5(B),(C)

TARIFF LANGUAGE:

"(B) *IC Terminal Location to IC Terminal Location*

When two IC terminal locations are connected together via Special Access Service, the IC will be billed as though the service were connecting an IC terminal location and an end user premises, i.e., Access Connection, Special Transport, Features and Functions (facility interface combination) and Special Access Line. One of the IC terminal locations will be treated as an end user premises.

(C) *End User to End User*

When two end user premises are connected together via Voice Grade 13 (VG13) Special Access Service, the IC will be billed as though the service were connecting an IC terminal location and an end user premises, i.e., Access Connection, Special Transport, Features and Functions, (facility interface combination) and Special Access Line. The end user premises at which the service connects to interstate service will be treated as an IC terminal location. No Special Access Service Surcharge will apply for this service."

ISSUES: It is unclear whether an end user charge applies to "IC terminal locations." WU and GTES contend that the higher Special Access Line rate should not be applied to an element that is in fact an Access Connection.

DISCUSSION: These provisions serve as an example of why the Special Access rate structure must be revised. Pursuant to this proposed section, a different rate applies according to whether the customer is called an IC or an end user. If the customer is designated as an end user instead of an IC, the rate imposed is nearly ten times as high. No justification is provided for charging different rates according to use, *e.g.*, according to whether the service is used to interconnect an IC, nor can we envision any justification for this rate disparity. It is unclear how two ICs interconnected with one another would be charged under this proposed rate structure, because the provision does not specify which IC would be considered the end user.

The proposed rate scheme, which varies charges according to use, is not cost-based. The rate restructuring which we have outlined above should help to alleviate the concerns of the commentors.

Furthermore, the term "treated as an end user premises" should be clarified to be consistent with our continuation of the non-applicability of Part 68 to carrier-to-carrier interconnection. The term "IC terminal location," should also be eliminated from the tariff. *See* Discussion in Section 2.1.5.

SUBJECT: Special Access Service—Rate Application Exception Rules—Dedicated Access Line Services

ECA TARIFF REFERENCE: § 7.4.5(D). *See also* § § 6.1.2, 7.1.1.

TARIFF LANGUAGE:

This provision sets forth the treatment accorded WATS access lines and extensions.

ISSUES: A number of commenters ask why the Dedicated Access Line Service is treated differently and why the surcharge is not applied to extension lines. (LC, WU, Allnet, MCI).

DISCUSSION: This provision must be eliminated from Special Access in accordance with the treatment of WATS in the *Second Reconsideration Order.*

SUBJECT: Special Access Service—Share Use Analog and Digital High Capacity Services

ECA TARIFF REFERENCE: § 7.4.8. *See also* § 5.2.7

TARIFF LANGUAGE:

"7.4.8 *Shared Use Analog and Digital High Capacity Services*

Shared use occurs when Special Access Service and Switched Access Service are provided over the same high capacity facilities through a common high capacity interface. This sharing arrangement is available only for existing services. The Special Access Service portion of the shared facilities will be billed at individual service rates (i.e., Voice Grade, Program Audio or Digital Data Access). No multiplexing charge will apply. See also 5.2.7 preceding."

ISSUE: No multiplexing charge will apply to shared use of Special Access and Switched Access high capacity services. (WU).

DISCUSSION: Section 7.4.8 describes the shared use of Special and Switched Access high-capacity services, and states that no multiplexing charge will apply to this shared use. Under this provision, Shared Use Analog and Digital High Capacity Services are made available only to current users.

The limitation of this offering to existing services and the proposal to provide multiplexing without charge have not been justified and appear unreasonable. This provision should be justified or eliminated.

SUBJECT: Special Access Service—Rates and Charges

ECA TARIFF REFERENCE: § 7.5

OTHER TARIFF REFERENCES:

e.g., Section 7.5 of Bell of Pennsylvania Tariff F.C.C. No. 41, South Central Bell Telephone Company Tariff F.C.C. No. 4, New York Telephone Tariff F.C.C. No. 41, New Jersey Bell Tariff F.C.C. No. 38, Pacific Telephone and Telegraph Tariff F.C.C. No. 128, Southern Bell

Tariff F.C.C. No. 61, Illinois Bell Tariff F.C.C. No. 43, Southwestern Bell Tariff F.C.C. No. 68, C&P Telephone Tariff F.C.C. No. 3 and Pacific Northwest Bell Tariff F.C.C. No. 8.

TARIFF LANGUAGE:

This provision sets forth the rates and charges for four Special Access Components—Access Connection, Special Transport, Features and Functions, and Special Access Line.

ISSUES: A number of commentors contend that the monthly rates proposed for Special Access represent dramatic increases and are not cost justified. (*e.g.*, ANPA, Bunker-Ramo, SBS, WU, USTEL, RCA, EMX, FEA, HTN, ARINC, Allnet, Group W, the networks, DJ, ITT, AP and CNS, SATNET, OCLC, AFSA, INTV, TNI, and LC). Commentors also contend that the rate increases are unlawfully discriminatory, (SBS, WU, USTEL, RCA, HTN, Allnet, Group W, ITT, TNI, AP and CNS) and vary significantly among the exchange carriers. (SBS, WU, USTEL, RCA, EMX, HTN, Allnet, GTES, GSA, Group W, the Networks, INTV, ITT, AP and CNS, and LC). Commentors also question the allocation of the access service revenue requirement and costs between Switched and Special Access, (*e.g.*, GTES, WU, SBS). Further, several commentors challenge the proposed Special Access rate structure as a whole. (*e.g.*, AHTUC, HTN, the Networks, ITT, DJ, Group W, WU and GTES).

LAT argues that the exchange access tariffs it has analyzed, those of New York Telephone, Illinois Bell, and Pacific Telephone and Telegraph, generally set forth fair rates and charges.

DISCUSSION: As discussed more fully above, a number of factors demonstrate that the proposed Special Access rate structure is unreasonable. To begin with, many of the rates proposed for Special Access are dramatically higher than existing rates for the same services. In the case of facilities for telex, program distribution and private voice and data networks, for instance, the exchange carriers have discarded existing service categories, rates and technical standards and proposed to replace them with monthly recurring charges that are typically 2 to 20 times higher than present rates, installation charges ranging from $500 to $2,000 per line, complex combinations of technical features and functions, and three-year waiting periods for the installation of new facilities. *See also* Discussion in Section 5. The significant rate increases for recurring and nonrecurring charges have not been cost justified.

Section 8. Billing and Collection

The billing and collection rate element was included in our access charge plan to accommodate an apparent MFJ requirement that if a BOC offers billing and collection services to even one IC, the charge for this service must be in the BOC's access tariff. Because only common carrier services can be tariffed, however, we required in the *Access Charge Order* that an exchange carrier offering a billing and collection service to one IC must offer the same to all ICs. *See* 47 C.F.R. § 69.114(c).

In the *First Reconsideration Order*, we noted that such services would include "activities associated with the collection and recording of billing information needed to calculate the billed amount, the processing of such billing information into customer invoice form, mailing of bills to customers including any preparatory work, collection of monies from billed customers, and the disbursement of monies collected from the billed customers." FCC 83-356, released August 22, 1983, at para. 146 n. 106. The ECA tariff offers these various billing and collection functions under five major optional categories of service: Recording, Message Billing,

Private Line Billing, Billing Analysis and Billing Information. Recording Service is the entering on magnetic tape or other acceptable medium of the details of IC messages originating through Switched Access Service. The assembling and editing function then identifies the message details for a particular IC, aggregates the details to create individual messages and verifies that the data required for rating (applying the IC's rate to individual messages) is present. Message Billing Service consists of two functions. The first, message processing, the the transformation of recorded IC call detail into rated messages. The second, bill processing, consists of the preparing and mailing of bills, payments, collecting overdue accounts, accepting end user deposits, and, if requested, the handling of customer inquiries concerning billed charges. Private Line Billing Service is essentially the same as Message Billing Service except that it is limited to IC private line services for which the exchange carrier is providing Special Access Service and to IC charges which do not involve usage based rate elements. Billing Analysis Service provides the IC with a means to protect against billing evasion activities by end users. Finally, Billing Information Service makes available to an IC certain information from the exchange carriers' records which is not considered proprietary and which is related to end user services provided by the IC.

While no rate of return constraint has been imposed on the billing and collection rate element, our access charge rules do require that charges for these services be both reasonable and nondiscriminatory. 47 C.F.R. § 69.114(b). Applying this reasonableness standard in practice, however, has proven to be most difficult since there are no existing billing and collection rates on file by which to judge those filed in the instant proceeding. The fact that billing and collection has traditionally been performed either by the carrier itself or by contract also accounts for the limited availability of unit cost and demand data and, consequently, the high number of rate elements for which exchange carriers seek to charge on an individual case basis. Determining rates on a to-be-negotiated basis, however, is tantamount to having no tariff on file.

The difficulties that we have encountered in reviewing this section, primarily as a result of the lack of historical data, has given us cause to reconsider the propriety of including billing and collection in the accesss tariffs. Indeed, it seems anomalous to label billing and collection as an access service given the way the rules define an "access service," *i.e.*, "services and facilities provided for the origination or termination of any interstate or foreign telecommunication." 47 C.F.R. § 69.2(a). The only billing and collection function which seems directly ancillary to a communications service is recording. The facilities involved in recording are clearly germane to the telephone company. To the extent that recording is performed in the normal course of network operations, there

would be a wasteful duplication of facilities were it to be done by some other entity. Once recorded IC call detail is made available, the other billing and collection functions can just as easily be performed by the IC itself or a commercial billing and collection agency. As we recognized in the *First Reconsideration Order*, billing and collection performed for third parties is not inherently part of a local exchange company's "bottleneck facilities" inasmuch as an IC which considers a local telephone company's charges for billing and collection services to be too high can construct and rely upon its own billing facilities. *See* para. 148. In fact, ICs other than AT&T do not rely upon local telephone companies to do their billing and collection. They have either set up their own systems or contracted with commercial billing agencies to do it for them. Hence, it would appear that billing and collection has the potential to become, if it is not already, a competitive service. To the extent that competition does develop, the marketplace will be able to supplant tariff regulation by responding to unreasonable rates and practices.

Given this set of circumstances, we have decided to institute a proceeding to examine the possibility of detariffing billing and collection. Pending action in this proceeding, we will permit most sections of the access tariffs dealing with billing and collection to go into effect as filed without our making a determination as to their lawfulness. Those provisions relating to recording service, however, will have to be revised in accordance with this order. In addition, the ramifications of allowing the telco to terminate local exchange service for nonpayment of long distance charges makes it incumbent upon us to give that section our immediate attention as well. To the extent that commenters have raised issues with respect to other billing provisions, consideration of those issues in greater detail will be deferred until we determine whether billing and collection should be detariffed.

SUBJECT: Recording Service

ECA TARIFF REFERENCE: Section 8.1

OTHER TARIFF REFERENCES:

Several other access tariffs contain essentially similar provisions.

TARIFF LANGUAGE:

"The Telephone Company will provide Recording Service in its operating territory. The minimum territory for which the Telephone Company will provide recording service is all the appropriately equipped offices in a state operating territory for which the IC has ordered Feature Group C and D Switched Access Service."

ISSUES: AT&T contends that defining minimum territory in terms of a state is too restrictive.

DISCUSSION: AT&T (and others) may want to arrange for recording service on an end office-by-end office basis since there is a direct relation between the feasibility of the company performing its own recording and the deployment of equal access capabilities in individual telco end offices. ICs should not be inhibited from providing their own billing and collection services if that would be more efficient. According to the BOCs/CSO reply comments, however, recording on an end office basis is not feasible at the present time because many exchange carriers are not equipped to do such. To the extent this becomes practicable in the future the tariff should be so revised. Carriers should therefore note in their 1985 tariff filings any progress that has been made toward making recording available at additional end offices.

It is also not clear from the language in this section what happens if a LATA or an exchange crosses state boundaries. This should be clarified.

SUBJECT: Recording Service—Undertaking of the Telephone Company

ECA TARIFF REFERENCE: Section 8.1.2(A)

OTHER TARIFF REFERENCES: Several other access tariffs contain essentially similar provisions.

TARIFF LANGUAGE:

"(A) The Telephone Company will record all IC messages over Feature Groups C and D Switched Access Service that are available to Telephone Company provided recording equipment or operators . . . . The recording equipment will be provided at locations selected by the Telephone Company. Assembly and editing will be performed on all IC messages recorded during the billing period established by the Telephone Company. Except as set forth in 8.1.2(F) and 8.1.3 following, recorded message detail from previous billing periods will not be recovered and made available to the IC."

ISSUES: AT&T contends that limiting the provision of recording service to Feature Groups C and D effectively precludes the provision of Foreign Exchange (FX) service.

DISCUSSION: AT&T asserts that billing for FX service will not be possible if message recording service is not available for Feature Group A (FGA) because there will be no customer-specific records for out-going FX calls. According to the BOCs/CSO reply comments, exchange carrier end user billing systems cannot presently recognize FGA billable messages and cannot, therefore, rate such messages for end user billing. The BOCs and CSO have agreed, however, to have exchange carriers review their systems to determine how the recordings can be identified and, if feasible, make recording service available for FGA.

To allow AT&T to bill customers for FX service, this section should, therefore, be revised so as to offer recording for FGA upon the request of an IC. Where an exchange carrier does have the ability to measure FX service on the basis of actual usage per line, billing should be done accordingly. Where such measurement capability is not available, an estimate of actual usage should be used, or if such a surrogate cannot be developed expeditiously, the local business line rate will be applied, pending the implementation of more precise measurement.

This section also places restrictions on the recovery of previously recorded message detail. Reference is made to Section 8.1.2(F) which states that "the telephone company will make every reasonable effort to recover" such detail and that requests therefore must be made within 30 days from the date the details were initially made available to the IC. Unless previously recorded message detail is readily available, billing disputes will be most difficult

to resolve. The tariff should therefore be revised so as to provide for a more exact standard for keeping message detail and an explanation should be given for the 30 day limitation. Finally, it should be clarified whether the telco will record both intrastate and interstate messages under this tariff.

SUBJECT: Recording Service Undertaking of the Telephone Company: Sorting; Billing Information Service — Undertaking of the Telephone Company

ECA TARIFF REFERENCE: Sections 8.1.2(C) and 8.4.2(J). *See also* Section 8.2.1(B)(1)(j) (rated IC message detail).

OTHER TARIFF REFERENCES: Several other access tariffs contain essentially similar provisions.

TARIFF LANGUAGE:

"8.1.2(C) The recorded IC message detail provided to the IC will not be sorted to furnish detail by specific end users, groups of end users, by office or by location."

"8.4.2(J) Upon request from an authorized supervisor of the IC who furnishes the account code assigned by the Telephone Company, the Telephone Company will provide name and town information from its CNA [Centralized Numbering and Addressing] bureau. The CNA name and town data, but not street address, will be provided only when the IC needs the information to authorize a call, to bill a call, or to handle an emergency situation. The information will be provided on a request by request basis by voice telecommunications. Name, town and state will be provided for a telephone number. A request includes the handling of one call and providing the data for one telephone number.

The Telephone Company will specify the location where requests are to be received and the format in which the request is to be made."

ISSUES: MCI contends that the telco's failure to provide sorting service is unreasonable since such information is readily available in the data recorded by the telco and would involve simple programming at a small cost. MCI also argues that denying the IC access to the street address of its customers under Section 8.4.2(J) would seriously impede the ability of an IC to perform its own billing when Feature Group D becomes available* and would, in effect, coerce ICs into using the telco's billing services.

DISCUSSION: The BOCs/CSO reply comments respond that sorting is not always as simple as MCI suggests. For example, because only 10-digit calling party and 10-digit called party information is present in the records the specific end user is not identified. The BOCs and CSO state that customer name and address information, sorted or otherwise, is available only by subscribing to Bill Processing Service. They also note that ICs have several alternatives at their disposal such as directory listings indexed by telephone number, wire center information, or simply dialing the number obtained through ANI and asking the customer for the desired information. These methods, however, would clearly be burdensome and would not yield data which is as accurate and up-to-date as that which the telco can provide. Furthermore, tying the provision of necessary billing data to the subscription to Bill Processing Service would inhibit the development of billing and collection as a competitive service by effectively foreclosing ICs from performing their own billing or having a

* With Feature Group D, and IC will be able to identify a calling customer's originating number through Automatic Number Identification (ANI) but will not know the customer's name and address.

commercial billing firm do it for them. To the extent that the type of information desired by MCI is available under Bill Processing Service, it would be difficult for the telco to argue that it does not have the ability to offer the same information under Recording Service. Since CNA information includes the address, as well as name and town, additional costs are seemingly not incurred if the address information is made available as part of access to the CNA files. Hence, the tariff should be revised so that the provision of sorting as well as customer name and address information is deleted from Bill Processing Service and made available to ICs under Recording Service. The telco may make such offer contingent on the IC furnishing it with such additional information needed to perform these services.

SUBJECT: Recording Service — Liability of the Telephone Company

ECA TARIFF REFERENCE: Section 8.1.3

OTHER TARIFF REFERENCES: Several other access tariffs contain essentially similar provisions.

TARIFF LANGUAGE:

This section provides that absent willful misconduct the telco's liability for damages for its failure to provide message detail to an IC is limited "to the granting of a corresponding credit adjustment based on an estimate of the last message volume to the IC amounts due to account for the unbillable revenue."

ISSUES: MCI contends that it is unclear whether the telco will estimate IC message volume and provide a credit only for related access charges or also for lost revenue. If only the former, MCI asserts that such a limitation is unreasonable.

DISCUSSION: The BOCs/CSO reply comments clarify that the exchange carrier will credit to the IC's account the lost message revenue that could have been billed to an end user. The provision, therefore, does not appear to be unreasonable.

SUBJECT: Recording Service — Payment Arrangements and Audit Provision: Minimum Period and Monthly Charge

ECA TARIFF REFERENCES: Section 8.1.5(B)

OTHER TARIFF REFERENCES: Several other access tariffs contain essentially similar provisions. *But cf.* GTE Tariff, Section 8.1.2.(B)(3).

TARIFF LANGUAGE:

The minimum period for which Recording Service is provided in the ECA Tariff is one month for each state in which the service is ordered whereas the GTE tariff provides for a minimum service period of one year.

DISCUSSION: We find that a minimum service period of one year is an unreasonable length of time and should be shortened to one month.

SUBJECT: Recording Service — Payment Arrangements and Audit Provision: Special Orders

ECA TARIFF REFERENCE: Section 8.1.5(D)

OTHER TARIFF REFERENCES: Several other access tariffs contain essentially similar provisions.

TARIFF LANGUAGE:

"When an IC requests changes to a pending Special Order for Recording Services, the pending Special Order will be cancelled and the requested changes will be undertaken if they can be accommodated by the Telephone Company under a new Special Order. All cancellation charges as set forth in (C) preceding will apply for the cancelled Special Order."

DISCUSSION: According to this provision the only way to change a special order is to cancel it and request a new special order. The IC, however, is forced to incur cancellation charges in that event. We find that this provision is unreasonably broad and that the carriers should clarify whether it is limited to material changes which cannot be implemented by a change to the existing order. If it is not, then further justification for this policy of not allowing modifications to existing special orders should be offered.

SUBJECT: Bill Processing Service: Denial of Local Exchange Service

ECA TARIFF REFERENCE: Section 8.2.1(A)(2); *See also* Section 8.2.1(D)(5)

OTHER TARIFF REFERENCES: Several other access tariffs contain essentially similar provisions.

TARIFF LANGUAGE:

"Treatment of accounts is the forwarding of notices of delinquent or unpaid end user accounts, posting of credits and adjustments, and when necessary as determined by the Telephone Company, denial of the IC's services and/or local telephone exchange services to an end user. Where local telephone exchange service access is denied, access to IC service will also be denied."

ISSUES: The commenters contend that telcos should not be allowed to discontinue an end user's local exchange service for nonpayment of interexchange service bills. (ACS, OCCO, NYPSC). The degree of discretion afforded the telco in this section has also been called into question.

DISCUSSION: Prior to divestiture, the threat of local disconnection may have been sensible because the end user contracted for both local and long distance service from essentially the same source (at least in Bell System territory). Nonpayment of either service constituted cause for disconnection of the other because the end user breached the contractual duty to pay for service rendered, whether long distance or local. This same relationship no longer exists in the post-divestiture era. Since the service provided by an IC is now unrelated to a customer's local service, we question whether it is reasonable to allow denial of local service for failure to pay IC service charges. The telco's relationship to the customer with respect to the service provided by the IC is that of billing agent or purchaser of receivables. A serious question of fairness to customers is raised where a subscriber's local telephone service is placed in jeopardy by a telco in its capacity as collection agent or holder of IC receivables.

Nevertheless, we are cognizant of the fact that there may be practical problems with prohibiting local termination of service, at least insofar as AT&T is concerned. AT&T presently stands in a different posture than the OCCs with respect to the line between the telco and the subscriber's home. Because OCCs presently have only a line side connection to the local end office, they are able to deny long distance service to a customer simply by refusing to recognize his access code. AT&T, on the other hand, may not have the ability to do this in all cases. Whether AT&T's long distance service can practicably be terminated without also shutting off local service may presently depend on the type of switching equipment in use at the particular end office or on other factors. Consequently, we will require the BOCs/CSO to submit technical justification for this provision by showing what operational restraints, if

any, would prevent telcos from separately terminating local and interstate service for AT&T under each of the feature group interconnection arrangements.

Section 8.2.1(A)(2) is also problematical in that it appears to give the telco too much discretion to determine when interexchange service should be denied for nonpayment. It is not the telco's customers who would be disconnected but rather the customers of the telco's customer, the IC. Therefore, the IC should be the one to determine when to stop providing service to one of its customers. It is ultimately responsible for bearing the burden of uncollectibles, not the telco. If the IC chooses to carry a customer who has been delinquent in his payments that should be its own business decision, subject to the requirements of the Act. The telephone company should not be allowed to control the IC's operations.

Section 9. Directory Assistance Service

Directory Assistance (DA) Service would allow ICs to offer their customers the ability to make long distance information calls directly to the telco's local directory assistance bureaus. Prior to divestiture, DA Service was not offered under tariff. The BOCs provided directory information to their own local exchange and intrastate long distance customers and to AT&T's long distance interstate MTS/WATS and private line customers, including customers who used an OCC's MTS or WATS-type service to place their calls. The costs of providing directory assistance service were shared among the BOCs, the independents and AT&T through separations and settlements procedures. The costs of interstate directory assistance were bundled into the rates for long distance calls, and such calls appeared to be "free". Small charges, however, are directly assessed for local information calls in some state and local tariffs. This state practice of not assessing direct charges for long distance directory assistance calls worked to the advantage of heavy users of directory assistance such as credit bureaus, collection agencies, marketing firms and telephone sales companies. These users paid the same rates for MTS/WATS long distance calls as customers who made no use of directory assitance service.

Under the terms of MFJ, the BOCs are required to provide the ICs with exchange access services on an unbundled, tariffed, non-discriminatory basis that allows the BOCs to recover the necessary costs of providing these services. Because DA service is provided via access to local exchange networks, it must be offered under a separate interstate tariff. Section 69.108 of our access rules specifies that telcos must assess a charge upon all interexchange carriers that request access to directory assistance boards through interexchange directory assistance trunks.

The rate structure proposed for Directory Assistance Service consists of three rate elements: (1) a per call charge for Directory Assistance Service which covers the operator service portion of the call, (2) a flat charge for Directory Access Service based on busy hour minutes of capacity ordered by the IC calculated in the same way as charges for other Switched Access Services set out in Section 6.8.1 of the ECA tariff,

and (3) a per call charge for Directory Transport which is a disaggregated, distance-sensitive rate. This rate element covers the haul from the IC's terminal connection in the telco's service area to the DA Service center.[1] Unlike other exchange access services, the network configuration for the provision of interstate DA Service involves routing the IC customer's DA Service call from an IC's terminal location to the fixed location of the DA office in the numbering plan area (NPA).

The ECA proposes a 49 cent per call charge for the operator service portion of a DA Service call. Many of the BOCs propose the same rate; however, a number of BOCs propose individual rates generally falling in the 30 to 70 cent range.[2] Although these are rates assessed on ICs, such costs would presumably be passed through to the end users who make the directory assistance calls. For example, AT&T estimates that the BOCs' charges for the operator assistance portion of the DA Service call average 64 cents. AT&T includes 64 cents as a rate element in its proposed 75 cent charge for each DA Service call made by its MTS and WATS customers.

Compared to the operator assistance rate element, the distance-sensitive transport rates proposed for interstate DA Service calls amount to a very small percentage of the total charge per call. The ECA's propose rates of .002 cents for the 0-1 mileage band and .02 cents per call for transport exceeding 100 miles. These charges are representative of the transport rates proposed by most of the BOCs.

The ECA proposes payment arrangements for DA Service that require ICs to order service for a minimum period of one year. Similar order periods are proposed for other exchange access services, however, they are considerably shorter than one year. ICs would also be required to provide six months advance notice before cancelling DA Service. Finally, the ECA would impose per call charges whether the IC's customer receives an incorrect telephone number or no number.

The comments and our review of the proposed interstate DA Service tariff raise a number of concerns. First, the justification and support material submitted for Section 9 is wholly insufficient to permit us to

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[1] In contrast to the ECA's usage sensitive rate structure for Directory Assistance Service, the independent telcos have in all cases proposed a flat monthly charge for Directory Assistance Service, as provided in our rules. We presume from their rates that they anticipate providing DA Service to only one IC, most likely AT&T. We point out that the MFJ does not require the independents to provide other ICs with the same service that they provide AT&T, as the BOCs are required to do.

[2] Although some BOCs such as Mountain States, New England Bell, and Southern Bell propose the same operator service rate for the various states comprising their service areas, others propose rates that vary by jurisdiction. For example, C&P Telephone proposes the lowest rate of 22 cents per call for the District of Columbia, and the highest rate per call of 93 cents for West Virginia. Northwestern Bell proposes a charge of 36 cents for each DA Service call made in Iowa and 60 cents a call in South Dakota.

reach a determination on the reasonableness of the tariff provisions and charges. Although we recognize that this is the first time directory assistance has been offered under an interstate tariff, and that it differs from other exchange access services, the telcos nevertheless bear the burden of adequately justifying proposed tariff rates and regulations. Second, we are concerned that the difference in current rates for local DA Service and the proposed rates for interstate DA Service may result in unreasonable discrimination against many small or infrequent users of interstate DA Service. MTS/WATS and MTS/WATS-type subscribers, who will in all likelihood pick up the DA Service charges passed through by the ICs, as AT&T proposes, will pay the interstate DA Service rates. Interstate private line subscribers, however, with direct connections to local exchanges may be able to avoid the interstate rates for DA Service and pay the local rates. Private line arrangements offering DA Service at lower local rates would be the most economical for the largest users of interstate DA Service. The costs of providing the interstate service, however, would be recouped from MTS/WATS or MTS/WATS-type customers who infrequently use interstate DA Service. As a result of the wide disparity in the local and interstate rates, certain customers would pay a much higher charge than others to obtain the same long distance directory information. We find, therefore, that the application of the proposed interstate DA Service rate structure would be unreasonably discriminatory.

In view of these concerns, we turn to the ECA's proposed 49 cent charge for the operator assistance portion of a DA Service call. The support material does not specify a cost methodology for determining this figure. There is no information about the allocation of operator costs between intrastate and interstate categories. Furthermore, there is no explanation of why certain BOCs rates vary from the ECA rate, and vary widely among the BOCs. Without this type of basic information we are unable to determine whether the operator assistance rates, which represent the bulk of the charge per call for DA Service, are reasonable. Accordingly, until these cost and discrimination concerns are addressed and resolved, and the telcos are able to submit suitable interstate DA Service tariffs, we are prescribing an interim rate for the operator assistance portion of interstate DA service calls. We find that there is not enough time before the scheduled effective date of April 3 1984 for the telcos to provide all necessary justification, and for us to conduct a thorough analysis. Therefore, we are requiring the telcos to revise their interstate DA Service tariffs to set a rate for the operator service portion of the charge per call that does not exceed 25 cents. "The 25 cent rate level will remain in place for one year from the effective date. We will, however, consider waivers of this requirement if telcos are able to provide

adequate justification of a different rate." Should telcos propose charges higher than 25 cents, they must address our concerns about rate discrimination.

We recognize that one of our primary goals is the implementation of cost-based rate making and that the most reasonable practice would be for the telcos to propose rate levels for interstate DA service that reflect the full cost of providing directory information to interstate customers. In view of these policies, we find that an interim 25 cent cap on operator assistance rates to be a rate level which we think is near or in the direction of costs. We also think that this level will not result in incentives to avoid the charge that would as great as those that could be expected under the proposed rates.

Last, we find that the proposed one year minimum service periods and the six-month advance notice period prior to cancellation of service to be unsupported and unreasonably long.

SUBJECT: Directory Assistance Service/Location of the DA Service Centers

ECA TARIFF REFERENCE: Section 9.2(D)

OTHER TARIFF REFERENCES: Similar provision in other access tariffs.

TARIFF LANGUAGE:

"(D) The Telephone Company will specify the DA location which provides the DA Service for each numbering plan area code (NPA)."

DISCUSSION: This provision does not comply with Section 61.55(h) of our rules which specifies that tariffs must contain a "list of cities, towns, and localities to and from which message rates apply". Because the telcos propose to determine rates based upon the mileage between the IC's terminal location and the DA location, these locations must be set out in the tariff. Without a list of DA locations in the tariff, there is no way to determine service locations or applicable transport rates.

SUBJECT: Directory Assistance Service/ Separate Trunk Group Requirement

ECA TARIFF REFERENCE: Sections 9.2(E)(1) and 9.3(D)

OTHER TARIFF REFERENCES: Similar provisions in other access tariffs.

TARIFF LANGUAGE:

"(1) When required by the Telephone Company, a separate trunk group will be provided for DA Service for each NPA.

(D) When requested by the Telephone Company, the IC shall order a separate trunk group for DA Service for each NPA."

DISCUSSION: Orders for separate trunk groups for the provision of DA Service may have significant rate implications for the ICs. Therefore, the tariff must clearly state under what conditions these charges would apply, or this provision must be eliminated.

SUBJECT: Directory Assistance Service/ Minimum Service Orders and Cancellation Notice Periods.

ECA TARIFF REFERENCE: Section 9.3(B)

OTHER TARIFF REFERENCES: Similar provision in other access tariffs.

TARIFF LANGUAGE:

"(B) When DA Service is initially ordered, the IC shall order the service for at least one year. Thereafter, additional service may be ordered for a minimum of one year. Not later than six months prior to the end of the one-year period, the IC shall notify the Telephone Company if the service is to be discontinued at the end of the one year period. If no notice is received from the IC, the Telephone Company will automatically extend the service for another year and all appropriate charges as set forth in 9.6 following for another year will apply."

ISSUES: ALLNET questions the reasonableness of a one year minimum service period. It points out that the minimum service period proposed for Special Access Services in the ECA tariff is six months, and that minimum service periods in current tariffs do not exceed one month. Similarly, AT&T contends that a six month service discontinuance notice period is unreasonably long and states that three months is sufficient.

DISCUSSION: We find that the support material does not provide adequate justification for these minimum periods. Generally, common carrier services should be made readily available with the least possible restrictions to the largest number of potential customers. Long service terms and notice periods do not foster this goal, and may pose substantial entry barriers to new or small entrants. Furthermore, as ALLNET suggests, we see no reason for a wide variance in minimum service periods among similar service offerings. We also agree with AT&T that a six month notice period to discontinue service is unreasonably long. A six month notice period may also have the effect of increasing the minimum service period to 18 months instead of one year. Where a small customer is involved, service discontinuance would be expected to have little or no disruptive effect on a carrier's service offering. If, however, a customer's use of a service could reach a level that represents a significant percentage of overall service, then termination liability provisions, as discussed in 9.4(A) preceding, may prove a reasonable measure to protect the carrier's financial interests. Therefore, we are requiring the carriers to revise these sections to stipulate a minimum service period of not more than six months and a discontinuance notice period not exceeding three months for Directory Assistance Service.

SUBJECT: Directory Assistance Service/Two Number Limit Per DA Service Call To Be Specified In IC's Tariffs

ECA TARIFF REFERENCE: Section 9.3(F)

OTHER TARIFF REFERENCES: Similar provision in other access tariffs.

TARIFF LANGUAGE:

"(F) The IC shall notify its end users through its tariff or other appropriate means that DA operators will respond to only two (2) telephone number requests per call and will not transfer, forward or redial the call to another location for any purpose other than the provision of DA Service."

DISCUSSION: The carriers must revise this provision to state that Directory Assistance Service operators will respond to only two requests for telephone numbers per call. There is

no obligation on the part of interexchange carriers to enforce the terms of another carrier's tariff. Furthermore, we note that it may be more efficient in terms of network usage if the telcos proposed to simply charge more per call for directory assistance requests that exceed two requests. The telcos should address this concern.

SUBJECT: Directory Assistance Service/ Minimum Monthly Charge When Service Is Discontinued

ECA TARIFF REFERENCE: Section 9.4(A)

OTHER TARIFF REFERENCES: Essentially identical provision in all other (BOC) access tariffs.

TARIFF LANGUAGE:

"(A) . . .

If DA Service is discontinued prior to the end of each one year period, the minimum monthly charge applies for each remaining month and fraction of month in the one year period."

DISCUSSION: It is not clear how the minimum monthly charge is calculated. Moreover, there is no material in the tariff submissions explaining why these charges represent a reasonable way of recovering costs incurred to provide service subsequently discontinued, or to replace customers who have discontinued the service. A customer who uses a high volume of service, for example, may be shown to place an extraordinary burden on the resources of one telco should this customer prematurely discontinue service. It is difficult to understand, however, why a small customer who would normally place only a few directory assistance calls would pose any greater problem vis a vis planning or reuse of service than local end users of equivalent size. For this reason, termination liability provisions have traditionally applied in cases where a common carrier undertakes to expend monies, or undertakes extraordinary capital expenditures on behalf of a small number of customers. Here, no showing has been made that a generally applicable termination liability would be reasonable. Accordingly, we will require that this provision be deleted until such times as the carriers are able to develop and justify a charge of the type proposed.

SUBJECT: Directory Assistance Service/ Credit Allowances for Service interruptions

ECA TARIFF REFERENCE: Section 9.4(H)(1)

OTHER TARIFF REFERENCES: Similar provision in other access tariffs.

TARIFF LANGUAGE:

"(1) When the DA location of DA operator equipment or terminals are out of service due to a Telephone Company equipment failure and an IC DA call has been answered or forwarded to a DA operator, a credit allowance for a call answered or forwarded to the DA operator equal to the rate for a Directory Assistance Service Call as set forth in 9.6 following plus the rate for a Directory Transport call will be applied to to the IC's charges. The rate for a Directory Transport call will be the average of the Directory Transport rates per call as set forth in 9.6 following."

ISSUES: AT&T contends that this tariff provision should also include a credit allowance for the switched access portion of a DA Service call that is not completed due to equipment failure on the part of the exchange carrier.

DISCUSSION: Credit allowance provisions generally provide full credit for all rate elements when service is interrupted by equipment failure of the underlying carrier. The tariff material does not explain why credit allowances would be recorded for all rate elements except the Switched Access portion of the call. Unless the carriers are able to provide adequate justification for denial of credit for the switched access portion of a DA Service call, this section must be revised to specify that credit allowances for all rate elements will be given when there is an equipment failure on the part of the carriers.

SUBJECT: Directory Assistance Service/ Operator Rate Per Call

ECA TARIFF REFERENCE: Section 9.6(A)

OTHER TARIFF REFERENCE: Similar provision in other access tariffs, however, the operator rate per call varies among local carriers.

TARIFF LANGUAGE:

	Rates
"(A) Directory Assistance Service Call, each	$0.4963"

ISSUES: The comments (ALLNET, CCTU) contend that the 49 cents for the operator service portion of the DA Service call is unreasonably high. They state that the carriers cannot justify this rate level, and that it is double the average 25 cent charge now assessed local users for the same directory assistance service.

DISCUSSION: As the comments point out, the support material filed with the access tariffs fails to adequately explain and justify the operator service charge per call. Although we have been furnished with voluminous 1984 budget projections, this information provides no way of determining how the operator service charge per call was developed. The individual tariffs filed by the BOCs also reflect a wide variance in operator service charges for certain local exchanges in the same region, and there is no accompanying material to explain or justify these differences in charges. We are concerned that the significant difference which exists between the generally lower level of local DA Service rates and interstate DA rates would result in users inefficiently bypassing interstate charges through arbitrage or private line facilities. Through "leaky" PBX facilities, users would be able to make interstate calls and access local DA Service at the local exchange rate. Accordingly, we find that the rates proposed by the telcos for the operator assistance protion of a DA Service call are unjustified and potentially discriminatory. Therefore, we will prescribe an interim rate for the operator assistance rate element of a DA Service call charge that does not exceed 25 cents.

"This rate level will remain in effect for one year. We will consider waivers of this requirement to the extent that telcos are able to justify a different rate." As stated above, we are taking this prescriptive action because the telcos have failed to provide a reasonable cost methodology for the proposed interstate DA Service operator assistance rates. Nevertheless, a rate structure must be in place by April 3, 1984, and there is not enough time to develop adequate cost support or restructure the rates. Interim rates will suffice until the telcos are able to do so. In our view, the 25 cent cap represents a rate level that is closer to the costs of providing DA Service, and at the same time will not cause massive avoidance of the charge by private line users, leaving the small customers to bear the brunt of the costs.

SUBJECT: Directory Assistance Service/ ICB Rates

ECA TARIFF REFERENCE: Section 9.6(B)

OTHER TARIFF REFERENCE: Similar provision in other access tariffs.

TARIFF LANGUAGE:

"Option:	*Monthly Rates*	*Nonrecurring Charges*
Provision of other than Telephone Company Selected Traffic Routing		
– Direct Trunking in Lieu of Tandem Trunking Per Directory Access Service Transmission Path	ICB rates and charges apply	
– Tandem Trunking in lieu of Direct Trunking Per Directory Access Service Transmission Path	ICB rates and charges apply	

ISSUE: Telesphere objects to the ICB rate structure for DA Service transmission options because ICB rates may be applied in a discriminatory fashion.

DISCUSSION: We generally view ICB rates unfavorably because it is difficult to determine whether such rates are non-discriminatory. Furthermore, this offering is vague and appears discretionary on the part of the carrier. Accordingly, the carriers should provide more description of the service options available under this provision, and devise specific rates for these transmission options. We recognize, however that the carriers have a limited period of time to respond to this direction, therefore, we will consider a schedule of general rates.

Section 10. Special Federal Government Access

Section 10 sets forth regulations applicable to access services provided to an IC serving the Federal Government or provided by the local telco to the Federal Government directly. Careful examination of this section reveals that certain of its provisions overlap with provisions elsewhere in the tariff. Thus, to avoid any unnecessary or unreasonable fragmentation of access service offerings, we conclude that this section should only include services and regulations that are unique to Federal Government access services and that are not included elsewhere in the tariff. Furthermore, and consistent with this approach, the Federal Government should not be charged different rates for the same services provided elsewhere under the tariff. Moreover, we reject a blanket provision in Section 10.6 which states that Federal procurement and other related acquisition Regulations will be followed when providing access services to the Federal Government. To allow for such a broad and general exception would, in effect, allow those various regulations to contravene or supersede the tariff itself and would violate Section 61.55(f) of the Rules. We note, however, that certain practices have developed and become accepted over the years between the Federal Government and its providers of communications services. We see no reason to disturb such

practices if they are not unreasonably discriminatory. Therefore, we shall allow specific exceptions applicable to Federal Government access services to be listed separately and individually in Section 10 and they will be evaluated on a case-by-case basis. Specific provisions proposed in this filing are discussed below.

SUBJECT: Special Government Access Services - General

ECA TARIFF REFERENCE: § 10.1

OTHER TARIFF REFERENCES: E.g., GTE Cos. § 11.1, Central Cos. § 12.1, and BOC tariffs.

TARIFF LANGUAGE:

"10.1 *General*

This section covers Special Access Services that are provided to an IC* for use only by agencies or branches of the Federal Government and other users authorized by the Federal Government.... [These services] are required to assure continuity of Government in emergency and crisis situations and to provide for national security.

* * * * *

*The Federal Government may be an IC for the provision of interstate telecommunications services for itself or for others."

DISCUSSION: Because we have corrected the ambiguous use of the term "IC," it is necessary to correct the terms of this provision to conform. The term "IC" should be removed from this section and the entire section should be re-written to conform with our discussion of the term "Customer" (see discussion of "Interstate Customer" in § 2.6, *supra*). This should eliminate the need for the footnote to this section.

SUBJECT: Special Federal Government Access Service - Intervals to Provide Service

ECA TARIFF REFERENCE: §§ 10.3 and 5.2.1 (C)

OTHER TARIFF REFERENCES: E.g., GTE Cos. § 11.3, Central Cos. § 12.3, and BOC tariffs.

TARIFF LANGUAGE:

"10.3 *Intervals to Provide Service*

Government requirements for short notice and short duration services do not fit the two categories of normal ordering options, (1) Access Order and (2) Planned Facilities Order. Orders for such services may be placed under the Short Notice provisions set forth in 5.2.1(C) preceding."

ISSUES: FEA contends that the provision will lead to unreasonable and unjustified higher costs for short-term service needs because the government would have to choose between paying for a minimum of 6 months of service for a normal Access Order (per § 5.2.5) or twice the non-recurring charge (per § 5.2.1 (C)(3)) for short-term service orders, which have a 30 day minimum period.

DISCUSSION: See discussion under § 5.2.1(C), *supra*.

SUBJECT: Special Federal Government Access: Federal Government Regulations

ECA TARIFF REFERENCE: § 10.6

OTHER TARIFF REFERENCES: E.g., GTE Cos. § 11.6, Central Cos. § 12.6, and BOC tariffs.

TARIFF LANGUAGE:

"10.6 *Federal Government Regulations*

Government Procurement Regulations, Defense Acquisition Regulations, Federal Procurement Regulations, Basic Agreements, Federal Agency Directives, as well as Presidential Directives will be followed when providing service to the Federal Government as an IC.

In accordance with Federal Government Regulations, all services provided to the Federal Government as an IC will be billed in arrears."

ISSUES: FEA argues that ICs attempting to meet requests for service should be able to receive service from the telco on the same basis as a telco serving the U.S. directly. Thus, it contends, an IC providing service to the U.S. should also be billed in arrears by the telco for access service.

DISCUSSION: As noted above, the first sentence of this section concerning the general applicability of Federal Government Regulations, etc., to access services must be deleted. Furthermore, the language "an an IC" no longer appears necessary. See our discussion under § 10.1, *supra*. In addition, we agree with FEA's argument that other carriers, such as AT&T, which obtain services from the access tariffs, should not be permitted to flow through the advance payment required of them to the Federal Government. To the extent that billing the Federal Government in arrears is required by Federal procurement or disbursement regulations or is established by law, it is not unreasonable to allow telcos to comply with such requirements. However, ICs providing service to the Federal Government are not entitled to the benefits of those laws or regulations providing for billing the Federal Government in arrears. See our discussion of § 2.4.1(B)(1)-(2), *supra*. This provision should be changed to reflect all of the above concerns.

SUBJECT: Special Federal Government Access Services - Quotation Preparation Charges.

ECA TARIFF REFERENCE: § 10.7

OTHER TARIFF REFERENCES: E.g., GTE Cos. § 11.7, Central Cos. § 12.7, and BOC tariffs.

TARIFF LANGUAGE:

"10.7 *Quotation Charges*

In order to comply with Federal regulations, quotation preparation charges will not apply when submitting unsolicited quotes or when submitting quotes in response to a general Request For Proposal or Invitation to Bid from agencies or branches of the Federal Government as an IC. However, a charge for quotation, as set forth in 2.1.9 preceding, will apply in all other cases."

ISSUE: EMS and ASC contend that this provision discriminates against other carriers and in favor of a local telco responding to a U.S. Government Request for Proposal. FEA, on the other hand, argues that if such charges are incurred by ICs, they will be passed on to the U.S. and subvert Federal Procurement Regulations and afford an anti-competitive advantage to local carriers. In reply, the BOCs/CSO argues that an IC is not likely to pass on the charge because the quotation charge is credited to the account when service is ordered. If either an IC or a local telco loses a proposed bid, a quote charge becomes a cost of doing business. The BOCs/CSO further argues that the local carrier should not have to absorb the costs associated with multiple quotations to ICs involved with the same U.S. proposal.

DISCUSSION: As discussed in Section 2.1.9, *supra*, the quotation preparation charge should be deleted. Thus, further discussion here is not necessary.

SUBJECT: Special Federal Government access - Service Offerings to the Federal Government

ECA TARIFF REFERENCE: § 10.8

OTHER TARIFF REFERENCES: E.g., GTE Cos. § 11.8, Central Cos. § 12.8, and BOC tariffs

TARIFF LANGUAGE:

This section provides descriptions of special services available to an IC only for agencies/ branches of the U.S. Government, other authorized users, and state emergency operations centers. Provides for ICB rates and charges and move charges.

DISCUSSION: This provision should include only those services unique to the Federal Government and not appearing elsewhere in the tariff. Furthermore, rates for services provided to the Federal Government should be consistent with the rates found in the rest of the tariff. Therefore, this section should be revised to reflect these instructions.

Section 11. Special Facilities Routing of Access Services, and Section 12. Specialized Service or Arrangements

Special Facilities Routing under Section 11 is provided over routes and facilities elected by the telco according to requirements specified by the customer. Services provided included Switched Access Service, Special Access Service, or Special Federal Government Access Service under one or more of the following conditions: (1) where two or more services must be provided over not more than two different physical routes; (2) where a service must be provided on a route which avoids specified geographical locations; or (3) where certain voice-grade services are provided on Cable-Only Facilities to meet the particular needs of a customer.

Under Section 12, specialized intra-LATA service or arrangements not offered under other tariff sections may be provided on an individual case basis (ICB) at the request of a customer. ICB rates and charges for services under Sections 11 and 12 are discussed below.

SUBJECT: Special Facilities Routing of Access Services; Specialized Service or Arrangements.

ECA TARIFF REFERENCE: §§ 11.2, 12.2

OTHER TARIFF REFERENCES: E.g., GTE Cos. §§ 7 and 9, Central Cos. § 7 and 11, and BOC tariffs.

TARIFF LANGUAGE:

These sections provide when these services may be offered and set rates and charges on an individual case basis (ICB).

ISSUES: GTES claims that implementation of tariffs containing ICB rates violates Section 203 of the Act.

DISCUSSION: The reply of the BOCs/CSO argues that ICB rates are legal because no service with ICB rates is provided until "dollars and cents rates" are filed with the Commission and become effective under Part 61 of the Rules, and that limited demand for certain facilities does not always allow for development of general rates. *See Reply* at I-131. In this case, however, the provisions under these sections are, in effect, for additional engineering and administrative costs associated elsewhere in the tariff. Therefore, charges can be developed for such services and should be filed in the tariff. However, as discussed in the Introduction to Appendix B, we are not generally requiring such charges to be listed in this filing.

Section 13. Additional Engineering, Additional Labor and Miscellaneous Services

This Section contains regulations and charges for additional engineering and labor requested by a customer, such as, for example, overtime installation and repair, and maintenance of service where trouble is reported by a customer, as explained in further detail below. In addition, Section 13 sets forth regulations and charges for several important miscellaneous services: presubscription, standard jacks provided in accordance with the Registration Program of Part 68 of the Rules, testing services for Switched Access and Special Access Services, access service billing information and protective connecting arrangements. Most of the comments addressing the various portions of Section 13 focus on the risks and conditions applicable to charges for maintenance of service and on the possible discriminatory effects of the presubscription provisions.

SUBJECT: Additional Engineering

ECA TARIFF REFERENCE: § 13.1

OTHER TARIFF REFERENCES: E.g., GTE Cos. § 8.2.2, Central Cos. § 8.1, and BOC tariffs.

TARIFF LANGUAGE:

The provision generally describes "Additional Engineering" as "that engineering or engineering consultation requested by the IC" as set forth in Sections 13.1.1 and 13.1.2. The telco will provide notice before any such engineering is undertaken.

ISSUES: The Networks argue that the extra costs for video service are unreasonable and unsupported.

DISCUSSION: We conclude that this entire provision fails to comply with Section 61.55(f) of the Rules and should be deleted. Many terms appearing in it, such as "Engineering Consultation" (§ 13.1.1) and "Engineering of Connections with Other Telephone Companies" (§ 13.1.2), are inherently unclear or vague, and the provision does not adequately describe when such terms would apply. Furthermore, engineering of connections with other telephone companies described in Section 13.1.2 is not an access service function and should not be tariffed.

SUBJECT: Additional Labor - Overtime Installation and Repair

ECA TARIFF REFERENCE: §§ 13.2.1 and 13.2.2

OTHER TARIFF REFERENCES: E.g., GTE Cos. § 8.2.3(A)(B), Central Cos. § 8.2.1-.2 and BOC tariffs.

TARIFF LANGUAGE:

"13.2.1 *Overtime Installation*

Overtime installation is that Telephone Company installation effort outside of regularly scheduled working hours.

13.2.2 *Overtime Repair*

Overtime repair is that Telephone Company maintenance effort performed outside of regularly scheduled working hours."

ISSUES: AT&T contends that the tariff is open to abuse because the provisions could be interpreted to impose overtime on an IC even where the telco employee's malfeasance or ineptitude is the cause of overtime. It suggests that the provision be clarified to apply only when the overtime work is clearly requested by the carrier and is the cause of the overtime expenses.

DISCUSSION: The lead provision to this section, § 13.2, states that additional work, including overtime, is only that work requested by the IC and agreed to by the Telephone Company. That provision further states that the telco will notify the IC before the additional labor is undertaken. This language largely obviates AT&T's concern. Its suggestion that overtime should only apply when "caused" by the IC is overly vague. However, § 13.2.5, which refers to "Other Labor" is itself a vague term and should be either clarified or deleted. In addition, the term "regularly scheduled working hours" should be defined.

SUBJECT: Charges For Additional Labor

ECA TARIFF REFERENCE: § 13.2.4

OTHER TARIFF REFERENCES: E.g., Central Cos. § 8.2.5, and BOC tariffs.

TARIFF LANGUAGE:

§ 13.2.4 sets forth the definition of additional testing, maintenance or repair of facilities connecting to telcos which are not "Concurring Carriers."

ISSUES: The use of the term "Concurring Carriers" is not clear.

DISCUSSION: Since there are no "Concurring Carriers" in the ECA tariff, only Issuing Carriers, and the provision does not specify or explain what tariffs the other carrier "concurs" in, the provision requires clarification.

SUBJECT: Maintenance of Service

ECA TARIFF REFERENCE: § 13.3.1

OTHER TARIFF REFERENCE: E.g., GTE Cos. § 8.2.4(A) and BOC tariffs. Similar provisions in Central Cos. § 8.3.1

TARIFF LANGUAGE:

"13.3.1 *Maintenance of Service*

(A) When an IC reports a trouble to the Telephone Company for clearance, the IC shall be responsible for payment of a Maintenance of Service charge when:

(1) the trouble is observed to be in the equipment or communications systems provided by other than the Telephone Company, or

(2) no trouble is found in the Telephone Company's facilities.

In either case, no credit allowance will be applicable for the interruption involved.

(B) The Telephone Company will advise the IC that it may be responsible for payment of a Maintenance of Service charge should either of the conditions in (A) preceding apply.

(C) The charges for Maintenance of Service are as follows:

Maintenance of Service *Periods*	*USOC*	*First Half Hour or Fraction Thereof*	*Each Additional Half Hour or Fraction Thereof*
Basic Time, regularly scheduled working hours, per technician	MVV	$44.12	$17.91
Overtime, outside of regularly scheduled working hours on a scheduled work day, per technician	MVV	$47.22*	$21.01*

ISSUES: ITT argues that the proposed change in ordering, maintenance, and test procedures shifts business risks formerly borne by the telcos to the ICs. AT&T contends that the provision gives telcos the power to apply access service charges in an arbitrary manner and that the maintenance of service charge should apply only where the telco dispatches its personnel to the customer's premises for testing and trouble is located in the customer's equipment. The BOCs/CSO reply first, that the charge does not apply if there is trouble in the telco's equipment, and second, that costs are incurred to test even when personnel are not sent to the premises. It also proposes a new subsection which would impose the charge on the IC in an additional situation.*

DISCUSSION: Subsection A could result in the IC being liable for the charge when the trouble is in CPE not provided by the IC or by the telco. In cases where the charge can be passed on by the IC to its customer, however, this does not appear unreasonable.

Although costs may be incurred for maintenance which does not require the dispatch of telco personnel, such maintenance seems generally a routine part of usual maintenance and is likely to be much less costly. The charge should be applied only when personnel are dispatched to a customer's premises. The provision should also make clear that the failure of telco personnel to find trouble in telco facilities will result in no charge, if the trouble is actually in those facilities but not discovered at the time. The telco also should not impose different maintenance charges for its own, unregulated, competitive customer premises equipment. Subsection B should be changed to provide: "The customer shall be responsible for payment of a Maintenance of Service charge when the Telephone Company dispatches personnel to the customer's premises, and the trouble is in equipment or communications systems provided by other than the Telephone Company or in detariffed CPE provided by the Telephone

* Reply of BOCs/CSO at V-64.

Company." The new subsection proposed by the BOCs/CSO should be filed separately with the usual justification.

SUBJECT: Presubscription

ECA TARIFF REFERENCE: § 13.3.3

OTHER TARIFF REFERENCES: *E.g.*, BOC tariffs, *Compare* GTE Cos. § 8.2.6.

TARIFF LANGUAGE:

"13.3.3 *Presubscription*

(A) Presubscription is an arrangement whereby an End User may select and designate to the Telephone Company an IC to access, without an access code, for interLATA interstate calls. This IC is referred to as the End User's predesignated IC.

(B) On the effective date of this tariff, all existing End Users will have Access Service to AT&T as their predesignated IC. Within 90 days after the introduction of Feature Group D in a serving end office, End Users may select one of the following options at no charge. Thereafter, a nonrecurring charge, as set forth in (D) following, applies for any change in Presubscription.

—Designate an IC as predesignated IC and dial 10XX or other access codes to each other ICs.

—Designate that they do not want to be presubscribed to any IC and choose to dial 10XX or other access codes for all calls for all ICs, including AT&T.

(C) New End Users will be asked to presubscribe to an IC at the time they place an order with the Telephone Company for Telephone Exchange Service. They may select either of the following options. There will be no additional charge for this initial selection.

—Designate an IC as predesignate IC and dial 10XX or other access codes to reach other ICs.

—Designate that they do not want to be presubscribed to any IC and choose to dial 10XX or other access codes for all calls to all ICs.

Subsequent to the installation of Telephone Exchange Service, a nonrecurring charge, as set forth in (D) following, applies for any change in Presubscription.

(D) The nonrecurring charge for Presubscription is as follows:

	Nonrecurring Charge
Presubscription, per Telephone Exchange Service line or trunk	$26.21

Note: This charge is billed to the End User which is the subscriber to the Telephone Exchange Service."

ISSUES: Various competing ICs argue that presubscription is inherently discriminatory (USTEL), unfair because AT&T is allowed to be the default carrier (MCI, TSC/SI, SBS, LC), and that it makes AT&T appear too integrated with the telco (GTES). It is also argued that the ninety-day period for free presubscritpion disadvantages later carriers and is not justified (GTES).

DISCUSSION: Presubscription does give an advantage to one interexchange carrier whose service can be used by the customer without dialing the four-digit access code. AT&T will also enjoy an immediate advantage over its competitors because of its dominant market position and its role as the default carrier. Other factors, however, weigh in favor of presubscription:

It avoids the reduction in the quality and convenience of service that mandatory access codes would require, while allowing customers to obtain access to all competing carriers by a four-digit code.

Carriers will also be free to compete for presubscriptions. Although AT&T will have a definite competitive advantage as the default carrier, under the MFJ the BOCs are required to publicize the fact that customers may presubscribe to any IC. New subscribers would also be required expressly to select any presubscription. This would mitigate and eventually eliminate AT&T's advantage without the inconvenience or expense of blocking or distributing calls by formula.

Although a charge for changing a presubscription could be reasonable to reflect administrative and technical costs, no justification is provided for allowing an initial presubscription without charge only within the first 90 days. It would be fairer to local customers and more equitable to competing carriers to allow a longer period, so that Feature Group D access can be implemented and marketed, and consumers can have an adequate opportunity to evaluate the competing services. The ECA is therefore directed to lengthen the ninety-day period to six months. The text of Section 13.3.3(B) should also be clarified to indicate whether a local subscriber may change its presubscription without charge during the initial period. See our discussion on non-recurring charges, *supra*, in relation to the level of charges.

SUBJECT: Standard Jacks—Registration Program

ECA TARIFF REFERENCE: § 13.3.4

OTHER TARIFF REFERENCES: *Compare* GTE Cos. § 8.2.7

TARIFF LANGUAGE:

This section cross-references Part 68 of the Rules and sets forth the charges for standard jacks used to terminate telco services and connect them with equipment registered under Part 68. Charges range from $11 for most standard voice jacks to $277 for a multiple line data jack.

ISSUES: USTEL suggests that the filing provides no basis for the levels of charges for standard jacks. As an example, USTEL notes that the charge for installation of an RJ11 jack used by AT&T is $11; the charge for a similar RJ31 jack, said to be very little different and used by OCCs, is $73. USTEL contends that this difference cannot be cost-justified. It also points out that other BOCs impose no charge to $11 for an RJ11 jack and from $18.66 to $73.13 for an RJ31 jack.

DISCUSSION: First, to avoid ambiguity, the tariff should clarify whether or not the charges include installation. The charges proposed for jacks are the charges which are currently in effect in other tariffs. In addition, an adjustment for inflation is proposed. We will permit the existing rates to continue in effect for an interim period only. The ECA and other carriers are directed to file cost supported rates for jacks in their 1985 filings. In the interim period, no adjustments for inflation will be permitted. The fact that these rates are being transferred from existing tariffs to proposed new ones does not automatically present an opportunity to increase rates. The proposed rates for jacks, therefore, should be modified in accordance with the above.

SUBJECT: Testing Services

ECA TARIFF REFERENCE: § 13.3.5

OTHER TARIFF REFERENCES: *E.g.*, BOC tariffs; *Compare* GTE Cos. § 8.2.8, and Central Cos. § 8.3.3

TARIFF LANGUAGE: This section describes the testing services available under the tariff and sets forth the rates and charges that apply for each of the various testing services offered.

DISCUSSION: It is not clear what testing is included in the basic charges and what is charged at additional rates. The tariff must provide standards (and a justification) for the distinction between scheduled and non-scheduled tests, and optional and non-optional tests. The provision is also defective because it contains incomplete specifications of tests by category. Furthermore, § 13.3.5(C) is unclear with regard to a minimum charge of four hours for certain call-outs, and the tariff provides no basis for the one-year minimum for certain tests. In addition, under § 13.3.5(A)(2), Automatic Scheduled Testing is required for Feature Groups C and D Switched Access Service. All required Feature Group C and D tests should be included in the overall rate for that service, and such maintenance obligations should be clarified in the applicable tariff provisions.

Section 14. Exceptions to Access Service Offerings

Finally, Section 14 reserves tariff sections for future listings regarding availability of service or components. No comments were filed on this section.

Tariff No. 3. Special Construction

Special construction tariffs have traditionally offered facilities when one or more of the following conditions exist: no other facilities are available and there is no other requirement for the facilities; the customer requests that service be furnished using a type of facility or via a route other than that normally used; the customer requests construction of a greater quantity of facilities than that which would otherwise be constructed to satisfy an order; the facilities are not available and the customer requests expedited construction at a greater expense than would otherwise be incurred; or the facilities are not available and the customer requests construction of temporary facilities while the permanent facilities are under construction. AT&T's special construction tariff, Tariff F.C.C. No. 262, includes three major types of charges: nonrecurring charges, recurring charges and termination charges. Under that and other special construction tariffs, the customer pays both special construction charges and any other charges contained in the service tariff applicable to the facility that is specially constructed. We refer throughout our analysis of the proposed special construction tariffs to AT&T's Tariff F.C.C. No. 262. This tariff currently contains terms and conditions for the AT&T, BOCs and independent telephone companies special construction offerings and therefore provides a convenient baseline for comparisons between proposed and existing tariffs.

The proposed ECA and BOCs tariffs basically continue the same conditions for special construction and the three types of charges. Those tariffs, however, propose a different basis for calculating termination charges. Under Tariff No. 262 there is no special construction charge for facilities in use more than ten years after they are placed in service. Thus, the maximum termination liability period is ten years. Under the proposed tariffs, the maximum termination liability period would be equal to the average account life of the facilities. For the federal government, however, this period would be equal to the average account life but would be calculated at ten year intervals. The ECA and BOCs have not justified this different treatment of two classes of customers. The proposed tariffs would also impose underutilization and excess capacity charges, but do not clearly distinguish between these two types of charges. The tariffs do not include any credit allowance for service interruptions, even though some customers will continue to be responsible for recurring charges if service is interrupted.

The proposed tariffs include a reference to the possible transfer of ownership of specially constructed facilities through an agreement outside the tariff. This provision is unlawful both because it refers to agreements outside the tariff and because it is potentially discriminatory. Finally, certain charges in these tariffs are either ambiguous, such as the partial payment charge, potentially duplicative, such as the expediting charge, or unreasonable, such as the rearrangement charge. Because the carriers filed no justification in support of these tariffs, the ECA and BOCs must eliminate or justify these charges.

SUBJECT: Special Construction—Ownership of facilities

ECA TARIFF REFERENCE: ECA Tariff F.C.C. No. 3, Section 2.2, and 2.6.4(A)

OTHER TARIFF REFERENCES: Essentially identical provisions in the BOCs special construction tariffs.

TARIFF LANGUAGE:

Section 2.2: "*Ownership of Facilities.* The Telephone Company retains ownership of all specially constructed facilities."

Section 2.6.4(A): "*Quotation Charge.* The payment of a quotation charge does not assign, confer, or transfer title or ownership rights of proposals or facilities designed or furnished by the Telephone Company. Title and ownership rights for any item remains with the Telephone Company, except as specifically provided by a written agreement, between all parties."

DISCUSSION: The language of Section 2.2 suggests that even those facilities constructed by connecting carriers are owned by the exchange carrier. This provision should be clarified to eliminate this ambiguity. The reference in Section 2.6.4(A) to a written agreement that could transfer ownership of facilities must be deleted. *See supra*, discussion ECA Tariff No. 1, § 2.4.7(B). If the carriers intend to provide an option to buy specially constructed facilities, the terms and conditions of such offering must be set forth in the tariff. *See* 47 C.F.R. § 61.74.

SUBJECT: Special Construction—Interval to provide facilities

ECA TARIFF REFERENCE: ECA Tariff F.C.C. No. 3, Section 2.3.

OTHER TARIFF REFERENCES: Essentially identical provisions in the BOCs special construction tariffs.

TARIFF LANGUAGE:

"*Interval to Provide Facilities*

Based on available information and the type of service ordered, the Telephone Company will establish a completion date for the specially constructed facilities. Although the Telephone Company will make every reasonable effort to ensure that the date is met, shortage of material, personnel or other factors may lengthen the installation interval. The Telephone Company does not guarantee that the facilities will be available on the scheduled date and assumes no liability other than that specified in the appropriate service tariff if that date is missed. If the scheduled completion date cannot be met, the party ordering the special construction will be notified and a new completion date will be established."

DISCUSSION: This exculpatory language is not contained in the current special construction tariff. The proposed provision would give the carrier unfettered discretion to reschedule a completion date for any reason. This attempt to relieve the carriers of any liability is unreasonable and therefore they should eliminate the second, third, and fourth sentences of this section. The carriers may provide instead that if circumstances beyond their control force them to reschedule, a new date for completion will be established.

SUBJECT: MIT Special Construction—Partial payment charge

ECA TARIFF REFERENCE: ECA Tariff F.C.C. No. 3, Section 2.5.3.

OTHER TARIFF REFERENCES: Essentially identical provisions in the BOCs special construction tariffs.

TARIFF LANGUAGE:

"*Partial Payments*

To safeguard its interests during construction, the Telephone Company may require a partial payment(s) for the portion of the estimated cost of the special construction for which a nonrecurring charge will apply. Partial payments may be requested as costs are incurred and will be credited against the total bill. Partial payments may not exceed the total nonrecurring charge for the special construction. If any partial payment is not received by the Telephone Company by the end of the first working day of the next month, the Telephone Company will cease all work on the special construction case and cancellation charges will apply as set forth in 2.6.4(G)."

ISSUES: MCI contends that this provision is open-ended and would allow the exchange carrier to require advance payments before special construction is begun and could require advance payment of any nonrecurring charge, including termination charges.

DISCUSSION: This provision is intended to relieve the telco of the risk of loss of investment and relates to the advance payment and deposit provisions of other service tariffs. As written, however, this provision is potentially discriminatory. The language, "[t]o safeguard its interests . . . the Telephone Company may require a partial payment(s)," would give the telco discretion to require partial payments from only certain customers. Therefore, this section should be eliminated. If the carriers intend to include deposit or advance payment provisions

for special construction, such deposit should be expressly limited in amount and should be required in a nondiscriminatory manner on the basis of specific standards, such as the customer's credit rating.

In addition, the provision that partial payments must be received by the end of the first working day of the next month is vague and ambiguous because it does not specify the exact amount of time between the due date for partial payment and the date the telco will cease work on the special construction case.

SUBJECT: Special Construction—Conditions requiring special construction

ECA TARIFF REFERENCE: ECA Tariff F.C.C. No. 3, Section 2.6.2.

OTHER TARIFF REFERENCES: Essentially identical provisions in the BOCs special construction tariffs.

"*Conditions Requiring Special Construction*

Special construction is required when 1) suitable facilities are not available to meet an order for service, and 2) the Telephone Company constructs facilities, and 3) one or more of the following conditions exist:

—The Telephone Company has no other requirement for the facilities requested.

—It is requested that service be furnished using a type of facility, or via a route, other than that which the Telephone Company would normally utilize in furnishing the requested service.

—More facilities are requested than would normally be required to satisfy an order.

—It is requested that construction be expedited, resulting in added cost to the Telephone Company."

ISSUES: MCI contends that the terms used in this section are vague and therefore violate Section 61.55(f) of the Commission's Rules and that the vague standards set forth in this tariff could be used to assess special construction liabilities for all OCC facilities requests, despite the elaborate ordering and forecasting procedures required in the access tariff.

DISCUSSION: The description of conditions requiring special construction contained in the ECA and BOCs tariffs are similar to those in the current special construction tariff. Since special construction is by nature developed on an individual case-by-case basis, certain terms such as "expedited" are defined as clearly as could be expected. The term "suitable facilities," however, which is not in the current special construction tariff, gives the exchange carrier too much discretion to determine when other facilities are available. Therefore, the ECA should eliminate the term "suitable" or substitute the term "suitable to the customer." Because special construction is determined on a case-by-case basis, we cannot address MCI's claims that, as a customer, it has been subjected to unilateral and arbitrary decisions by the carrier that special construction is required to meet MCI's requests for service.

SUBJECT: Special Construction—Quotation Charges

ECA TARIFF REFERENCE: ECA Tariff F.C.C. No. 3, Section 2.6.4(A)

OTHER TARIFF REFERENCES: Essentially identical provisions in the BOCs special construction tariffs.

TARIFF LANGUAGE:

"*Quotation Charge*

A nonrecurring charge for the preparation of a quotation applies whenever an estimate for special construction charges and liabilities is requested. The charge includes the costs associated with the development and preparation of the quotation.

The quotation is valid for 90 days and identifies all rates, charges and liabilities associated with the provision of the facilities required to satisfy a service request. Within this 90 day period, if the service is ordered as quoted and service is subsequently provided, the quotation charge will be credited to the appropriate account.

If a request for a quotation is cancelled prior to its completion, a bill will be rendered for the costs incurred for quotation preparation through the cancellation date. The payment of a quotation charge does not assign, confer, or transfer title or ownership rights of proposals or facilities designed or furnished by the Telephone Company. Title and ownership rights for any item remains with the Telephone Company, except as specifically provided by a written agreement between all parties."

DISCUSSION: The provisions imposing quotation charges should be deleted. *See supra*, discussion ECA Tariff No. 1, § 2.1.9. In addition, the carriers must delete the references in the special construction tariffs to quotation charges, both in Section 2.7 regarding deferral of services and in Section 2.9 regarding the application of quotation charges to the federal government.

SUBJECT: Special Construction—Case preparation charge

ECA TARIFF REFERENCE: ECA Tariff F.C.C. No. 3, Section 2.6.4(B)(1)

OTHER TARIFF REFERENCES: Essentially identical provisions in the BOCs special construction tariffs.

TARIFF LANGUAGE:

"*Case Preparation Charge*

A nonrecurring charge always includes a case preparation charge component to cover the administrative expenses associated with preparing a special construction case and the associated tariff filing."

ISSUES: MCI argues that this nonrecurring charge covers administrative costs that should be included in the total cost of special construction and recovered through termination liabilities and other charges.

DISCUSSION: The BOCs/CSO respond that because initial case preparation expenses are not properly capitalized on the books of an exchange carrier, they should be included as a nonrecurring charge. We do not find it unreasonable for a carrier to recover administrative expenses through this charge.

SUBJECT: Special Construction—Nonrecurring expediting charge

ECA TARIFF REFERENCE: ECA Tariff F.C.C. No. 3, Section 2.6.4(B)(2).

OTHER TARIFF REFERENCES: Essentially identical provisions in the BOCs special construction tariff.

TARIFF LANGUAGE:

"*Expediting Charge*

A nonrecurring charge may include an expediting charge when it is requested that special construction be completed on an expedited basis. The charge equals the difference in estimated cost between expedited and nonexpedited construction."

DISCUSSION: One of the conditions requiring special construction set forth in Section 2.6.2 of the ECA and BOCs tariffs is that the customer requests expedited construction. The proposed tariffs, however, would impose an expediting charge in addition to the nonrecurring, recurring and termination charges imposed for other cases of special construction and in addition to any expedition charges under the applicable service tariff. Because this nonrecurring charge for expedition is not contained in the current special construction tariff, the ECA and BOCs should justify or eliminate this charge.

SUBJECT: Special Construction—Nonrecurring rearrangement charge

ECA TARIFF REFERENCE: ECA Tariff F.C.C. No. 3, Section 2.6.4(B)(5).

OTHER TARIFF REFERENCES: Essentially identical provisions in the BOCs special construction tariffs.

TARIFF LANGUAGE:

"*Rearrangement Charge*

If the Telephone Company is requested to rearrange existing specially constructed facilities, a nonrecurring charge component equal to the cost of rearrangement will apply."

DISCUSSION: The ECA has not justified the imposition of a charge for rearranging existing special construction when no new special construction occurs. In such cases, the service rearrangement charge under the applicable service tariff would appear to compensate the carrier for any rearrangement costs. Therefore, the carrier should either eliminate this provision or provide instead:

"*Rearrangement Charge*:

If the Telephone Company is requested to rearrange existing specially constructed facilities, a nonrecurring charge equal to the cost of any additional special construction will apply."

SUBJECT: Special Construction—Termination liabilities

ECA TARIFF REFERENCE: ECA Tariff F.C.C. No. 3, Sections 2.6.4(C) and 2.9 [Issue 1]

OTHER TARIFF REFERENCES: Essentially identical provisions in the BOCs special construction tariffs.

TARIFF LANGUAGE:

2.6.4(C) "*Maximum Termination Liability and Termination Charge*

A Maximum Termination Liability is equal to the nonrecoverable costs associated with specially constructed facilities and is the maximum amount which could be applied as a Termination Charge if all specially constructed facilities were discontinued before the Maximum Termination Liability expires.

The liability period is equal to the average life of the account associated with the specially constructed facilities, except in the case of the Federal Government (see 2.9). The liability period is generally expressed in terms of an effective and expiration date.

A Termination Charge may apply when all services using specially constructed facilities which have a tariffed Maximum Termination Liability are discontinued prior to the expiration of the liability period. The charge reflects the unamortized portion of the nonrecoverable costs

at the time of termination, adjusted for net salvage and possible reuse. Administrative costs associated with the specific case of special construction and any cost for restoring a location to its original condition are also included. A Termination Charge may never exceed the filed Maximum Termination Liability."

2.9. "*Regulations for the Federal Government*

Special construction provided to the Government is subject to all regulations specified in 2.1 through 2.8, with the following exception. In lieu of a filed Maximum Termination Liability Period equal to the average account life of the specially constructed facilities, the Maximum Termination Liability will be filed at ten-year intervals for the average account life of the facilities. In the event that the average account life of the facilities is not an even multiple of ten, the last increment filed will reflect the appropriate number of years remaining (e.g., seven years for plant with a 27-year life).

Prior to the expiration of each liability period, the Government has the option to (A) extend the use of the specially constructed facilities for the new liability period, or (B) terminate the special construction case and pay the appropriate charges.

The Telephone Company will notify the Government six months in advance of the expiration date that the special construction case is subject to renewal. The Government must provide the Telephone Company with written notification of termination, to be received one month prior to the expiration of the liability period. Failure to do so, and payment of the next month's service charges, will result in an extension of the special construction case for the next ten-year interval.

(A) *Continued Use of Special Construction*

When the Government elects to continue the case of special construction, a revised Nonrecurring Charge, Maximum Termination Liability, and Maximum Termination Liability Period will be filed.

(B) *Termination of the Use of Special Construction*

When the Government elects to terminate a case of special construction at or prior to the expiration of the current liability period, termination charges will apply."

ISSUES: MCI argues that the tariff imposes unreasonably long liability periods and unjustifiably establishes a maximum termination liability period for the federal government different from that for other customers.

DISCUSSION: By way of background, the current tariff provides that, "[w]here the customer continues the use of services or channels involving special construction for a 10 year period after they are placed in service, no charge applies." AT&T's Tariff F.C.C. No. 262, Section 2.2.a.(1)(a). The ECA and BOCs propose to revise this maximum liability period so that termination charges would apply if specially constructed facilities are discontinued before the average account life of those facilities expires. MCI objects that such a liability period is unreasonably long and subjecting customers to such prolonged liabilities is inherently unreasonable. The "useful life" standard for maximum liability periods, MCI argues, is too vague and would allow unjustified wide variations in liability periods for different special construction cases. MCI urges that the ECA adopt a ten year maximum liability period as now exists in AT&T's Tariff No. 262 and as is proposed by the GTE Telephone Operating Companies in their special construction tariffs, NO. 4, Section 2.2.a.(1)(a). MCI also objects to the establishment of ten year maximum liability periods for the federal government but not for other customers.

We do not agree with MCI's argument that a termination liability period equal to the average account life of the specially constructed facilities is an unreasonable business practice. Those facilities do, as the BOCs/CSO maintain, generate a revenue requirement during their entire account life because they are carried on the carrier's books during that

time. Thus, the proposed termination liability period appears necessary to protect the carrier from revenue shortfalls caused by premature disconnection.

We do agree, however, that the ECA and BOCs have not justified the proposal to calculate termination liability periods for the federal government on a basis different from that for all other customers. The BOCs/CSO deny that the federal government's termination liability periods will be equal to ten years. None of the tariffs or pleadings, however, clarifies what is meant by the provision that maximum termination liability "will be filed at ten-year intervals for the average account life of the facilities." Thus, this tariff provision is ambiguous and unclear in violation of Section 61.55(f) of the Commission's Rules. 47 C.F.R. § 61.55(f). Moreover, if the ECA and BOCs intend to use a basis for calculating termination liabilities for the federal government different from that for other customers, they must justify such discrimination in treatment of different classes of customers.

In addition, the ECA and BOCs have not justified the imposition of terms and conditions of termination liability for the federal government different from those for other customers. For example, the ECA and BOCs tariffs do not justify revising the nonrecurring charge for the federal government at the ten year intervals when new maximum termination liability periods will be filed. Since the nonrecurring charge is a one time charge imposed at the initiation of special construction, this charge cannot be revised and reimposed at a later time during the life of the facilities.

Finally, we disagree with MCI's argument that the ECA tariff should provide, as does the current special construction tariff, that maximum termination liability will not apply when there is another requirement for all or part of the facilities. The ECA and BOCs tariffs adequately provide for this situation by including "possible reuse" in the calculation of termination charges.

SUBJECT: Special Construction—Recurring underutilization and excess capacity charges

ECA TARIFF REFERENCE: ECA Tariff F.C.C. No. 3, Sections 2.6.4(D) and 2.6.4(E)(1) [Issue 1]

OTHER TARIFF REFERENCES: Essentially identical provisions in the BOCs special construction tariffs.

TARIFF LANGUAGE:

Section 2.6.4 (D): "*Annual Underutilization Liability and Underutilization Charge*

Annual Underutilization Liability is a per unit amount which is based on the per unit cost of specially constructed facilities. The liability remains in effect until the expiration of the Maximum Termination Liability or until the special construction case is discontinued and all termination liabilities associated with the case are discharged. An underutilization charge may be applicable after the expiration of the minimum period, as set forth in the appropriate service tariff, depending on the quantity of specially constructed facilities in service.

No underutilization charges are computed or billed until one year after the minimum period expires. At that time, an underutilization charge applies to the difference, if any, between the original number of specially constructed facilities and the number of specially constructed facilities in service at filed tariff rates. *With voice grade cable pairs only, this computation is performed based on 70% of the original number of specially constructed cable pairs.* The underutilization charge applies from the date the minimum period expires and annually thereafter. For purposes of determining an underutilization charge, any facilities subject to minimum period monthly charges are considered to be in service at filed tariff rates."

Section 2.6.4 (E) (1): "*Recurring Monthly Charges*

(1) *Excess Capacity Charge*

A recurring monthly excess capacity charge applies when more facilities are requested and subsequently specially constructed than are required to satisfy an order for service.

The charge is based on the estimated cost difference between the facilities constructed and the facilities which would normally be required to meet the order for service. Charges apply until there are sufficient services to warrant the facilities which were originally constructed."

ISSUES: MCI contends that the underutilization charge requires an unreasonably high degree of traffic forecasting accuracy by the customer, is anticompetitive and is based on unclear standards.

DISCUSSION: The ECA and BOCs would impose an annual underutilization charge which provides that one year after the expiration of the minimum period set forth in the applicable service tariff, a customer will be liable for underutilization of specially constructed facilities. The underutilization charge will apply to the difference between the amount of originally ordered special construction and the amount of special construction in service at tariff rates. The underutilization charge is based on the per unit cost of unused specially constructed facilities.

MCI objects that the customer is required to forecast its traffic for unreasonably long periods with an unreasonable degree of accuracy. Such requirement, MCI argues, is anticompetitive because it is harmful to new entrants for whom the loss of a few large customers would cause significant shifts in traffic and unreasonably insulates an exchange carrier from normal market risks.

In response, the BOCs/CSO agree that 100% forecasting accuracy is an unreasonable standard in the case of voice grade cable pairs. Accordingly, a tariff modification is proposed to provide that in such cases, underutilization charges will apply where less than 70% of constructed voice grade cable pairs are in use. We will allow this proposed modification to be filed. The ECA and BOCs should, however, justify or eliminate the requirement of 100% forecasting accuracy for all other specially constructed facilities. To the extent questions of reasonableness are raised with respect to the forecasting accuracy required for facilities other than special construction, those will be addressed in other proceedings. *See also supra*, discussion ECA Tariff No. 1, § 5.

MCI also argues that the standards for application of underutilization charges would allow unreasonable application of these charges, such as the cases in which MCI's underutilization liability has exceeded the original cost of the specially constructed facilities. The BOCs/CSO response does not adequately address the question of how the underutilization charges would be calculated. Because this charge does not exist in the current special construction tariff, the ECA and BOCs should clarify and explain, perhaps by an example, how such charges will be calculated. In this regard, the BOCs/CSO have adequately explained that underutilization charges do not duplicate the activation charges under applicable service tariffs because underutilization charges apply only one year after the minimum service period expires, while activation charges are assessed during that minimum period.

Finally, the tariff does not clearly state how the exchange carrier would determine whether underutilization or excess capacity charges would apply. Without such clarification, these charges appear to be overlapping, potentially discriminatory and the application of each appears to depend on the customer's intent at time of ordering special construction. The ECA and BOCs should justify and explain the difference in these charges or eliminate them.

SUBJECT: Special Construction—Application of termination and underutilization charges

ECA TARIFF REFERENCE: ECA Tariff F.C.C. No. 3, Sections 2.6.4(C) and 2.6.4(D) [Issue 2]

ISSUES: MCI contends that the tariff should provide that no special construction charges will apply where replacement of facilities is required to achieve equal access or to change to more technically advanced facilities.

DISCUSSION: To require the carrier, as MCI argues, to discontinue termination and underutilization liabilities for outmoded equipment would impose the continuing cost of such facilities on all other ratepayers. Thus, it would not be unreasonable to apply special construction charges where the conditions of special construction exist even if such construction is required to replace existing facilities with more technically advanced ones. Moreover, equal access issues will be addressed in other proceedings.

SUBJECT: Special Construction—Credit allowance for service interruption

ECA TARIFF REFERENCE: ECA Tariff F.C.C. No. 3 [No reference]

DISCUSSION: Unlike the current special construction tariff, the ECA and BOCs special construction tariffs do not contain a provision for credit allowance for service interruption. This exclusion is unreasonable because customers may be obligated for continuing recurring charges even if service is completely interrupted. Therefore, they should revise their tariffs to include a reasonable credit allowance for service interruptions.

SUBJECT: Special Construction—Headings of pages

ECA TARIFF REFERENCE: ECA Tariff F.C.C. No. 3 [No reference]

DISCUSSION: This tariff does not contain the tariff title as a heading on any pages after the title page. The ECA should correct this ambiguity in any future filings to fully comply with Section 61.55(f) of the Commission's Rules.